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IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

NO. 82-

EDWIN RIVERA,

Petitioner,

-against-

PHILIP COOMBE, JR., Superintendent,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the "charge as a whole" analysis of the Court of Appeals for the Second Circuit, which upheld the jury instruction that "a man is presumed to intend the natural and probable consequences of his act," conflicts with the analysis in Sandstrom v. Montana, 442 U.S. 510 (1979), which held such a charge violative of due process.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 683 F.2d 697. It is reproduced below as Appendix A. The opinion of the district court is reported at 534 F.Supp. 980. It is reproduced below as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1982. A timely petition for rehearing was filed and was denied on August 23, 1982.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV.

STATEMENT OF THE CASE

Petitioner, Edwin Rivera, was indicted in the New York Supreme Court, Bronx County, for murder in the second degree[1] and for a misdemeanor charge of possession of a weapon.[2] It was alleged that petitioner, then a teenage youth with no prior convictions, had intentionally stabbed Guy Keyes to death.

The Trial

On the evening of February 28, 1974, Keyes, a six-foot tall, twenty-two year-old black man, accosted Rosario Castro in a drunken manner, demanding cigarettes and money. Petitioner, sixteen years old and slightly over five feet tall, interceded on Ms. Castro's behalf, escorting her to her grandmother's store, the Aida

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1 Murder in the second degree is defined, in relevant part, in N.Y. Penal Law §125.25(1):

> A person is guilty of murder in the second degree when . . . [w]ith intent to cause the death of another person, he causes the death of such person. . . .

2 The misdemeanor charge is not at issue in this habeas proceeding.

Superette.

About ten minutes later, Keyes entered the store, accompanied by two tall black men. Keyes declared that he was "looking for trouble." After Ms. Castro and her grandmother managed to get Keyes outside, Ms. Castro's brother, John Velez, came to their aid.

A crowd gathered outside the store, and some members of the crowd, including petitioner, chased Keyes away. Several minutes later, petitioner returned to the store, holding a knife. He told Velez and Jose Mendez, "I think I stabbed him [Keyes] in the back."

The medical examiner, Dr. Dominick DiMaio, testified that Keyes died from a single stab wound, four to five inches deep.

Petitioner testified in his own behalf, and admitted helping Ms. Castro when Keyes first bothered her, as well as joining in the group that chased Keyes away from the store. But he denied any intent to harm Keyes, denied stabbing him, and denied possessing a knife or making a statement about the stabbing.

In its charge, the court instructed the jury both on murder in the second degree and the lesser included offense of manslaughter in the first degree.[3] Defense counsel also requested instructions on the lesser crimes of manslaughter in the second degree (N.Y. Penal Law §125.15(1); recklessly causes death), criminally negligent homicide (N.Y. Penal Law §125.10), menacing (N.Y. Penal Law §120.15), and reckless endangerment in the first and second degrees (N.Y. Penal Law §§120.20,

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[3] Manslaughter in the first degree is defined, in relevant part, in N.Y. Penal Law §125.20(1):

> A person is guilty of manslaughter in the first degree when . . . [w]ith intent to cause serious physical injury to another person, he causes the death of such person or of a third person. . . .

120.25). With regard to all of these crimes, counsel argued that the sparse evidence concerning petitioner's mental state raised the possibility of a lesser degree of culpability. Although the prosecutor consented to the requests for second degree manslaughter and criminally negligent homicide, the court denied all of the further requests.

During its charge, the court instructed the jury on intent, as follows:

> I shall now define intent for you. A person is presumed to intend the natural and probable consequences of his act. Criminal intent is an intent do do knowingly and wilfully that which is condemned as wrong by the law. A criminal intent may be inferred from all the circumstances of the case. It need not be established by direct proof. To constitute the crime there must not only be the act but also the criminal intent and these must occur, the latter being equally essential with the former. The existence of criminal intent constitutes a question of fact for determination by you and the burden of showing intent, the intent with which a crime has been committed rests upon the prosecution to establish it by evidence beyond a reasonable doubt. So where the law requires that the People must establish a specific or certain intent on the part of one charged with the commission of a crime, the law does not expect or require for obvious reasons that intent must be proved by direct proof to an absolute certainty or with mathematical precision. Intent, I mean criminal intent, is always an essential element of the commission of the crime such as we have here and it may be proved by direct evidence or it may be proved from circumstances surrounding the transaction or the act itself, or it may be proved by a combination of both. What is intent? Intent is a frame of mind of the perpetrator of the act at the time he commits it. You must probe the mind. You may say to yourself how are we to determine what a man's intentions are. Well members of the jury, we can only determine that by his acts, by his conduct, by what he says and by what he does. You should consider what he allegedly did, what means he al-

legedly employed, the type of instrument allegedly used, if any, the part of the body allegedly attacked, and all the circumstances. And from these surrounding circumstances you are to determine the intention of the defendant at the time.

Under our law every person is presumed to intend the natural and inevitable consequences of his own voluntary acts and unless such acts were done under circumstances which would preclude the existence of such intent, the jury has a right to infer from the results produced, the intention to effect such result. The intent formed, is a secret and silent operation of the mind and its physical manifestations, the accomplishment of the thing determined upon. The individual whose intent is sought to be ascertained may remain silent or if he speaks, may probably will if he has a crime to hide, speak untruthfully, and thus the mind is compelled from necessity to refer to the act and the physical manifestations of the intent exhibited by the results produced as the safest if not the only proof of the fact to be ascertained [emphasis added].

Regarding the murder count, the court charged that the prosecution had to prove intent to kill. And in defining first-degree manslaughter, the court stated that the "only" intent the prosecution had to prove was intent to cause serious physical injury. General instructions on reasonable doubt and the presumption of innocence included statements that the burden of proof rested with the prosecution.

The jury acquitted petitioner of murder, but found him guilty of manslaughter in the first degree and misdemeanor possession of a weapon.

Sentencing

On September 12, 1975, petitioner was sentenced to a term of imprisonment of seven to twenty-one years for the manslaughter conviction and to an unconditional discharge for the misdemeanor conviction.

The State Appeals

On October 3, 1977, petitioner's convictions were affirmed without opinion by the Supreme Court of the State of New York, Appellate Division, First Department. People v. Rivera, 59 A.D.2d 829, 398 N.Y.S.2d 351. The New York Court of Appeals denied petitioner leave to appeal to that court on November 21, 1977. People v. Rivera, 43 N.Y.2d 799, 402 N.Y.S.2d 1037. Subsequently, pursuant to N.Y. Crim. Proc. Law §440.10, petitioner filed a motion with the judge who presided at his trial, seeking to vacate the first degree manslaughter conviction on the ground that, under Sandstrom v. Montana, 442 U.S. 510 (1979), the judge's "natural consequences" intent instructions violated his Fourteenth Amendment right to due process.

On November 28, 1979, the judge denied the motion, on the merits. He found that homicidal intent was not at issue since, at trial, petitioner denied committing the stabbing. The judge also determined that, in any event, the challenged instruction was not error because the jury was given the choice whether to employ the "natural consequences" presumption. On February 5, 1980, the Appellate Division denied leave to appeal the judge's decision.

Federal Habeas Corpus Proceedings

On December 31, 1980, petitioner sought a writ of habeas corpus (28 U.S.C. §2254) in the United States District Court for the Southern District of New York, again asserting the unconstitutionality of the "natural consequences" intent instructions. The Hon. Robert Ward granted the writ on February 11, 1982. 534 F.Supp. 980. Appendix B.

After noting that petitioner exhausted his state remedies (Appendix B, at 5-6), the District Court turned to the merits. In finding the intent instructions violative of due process, Judge Ward first summarized Sandstrom's teachings concerning the unconstitutionality of instructions which can be understood as mandatory, conclusive or burden-shifting presumptions on intent. Appendix B, at 6-8. Under Sandstrom, the District Court continued,

> [a] charge susceptible of such an interpretation by a reasonable jury so infects the trial of which it is a part that a conviction rendered subsequent to the charge cannot withstand due process attack, see Cupp v. Naughten, 414 U.S. 141, 147 (1973), even if the charge was also capable of being understood by a reasonable jury in a manner that comports with the Constitution, see Leary v. United States, supra note 2, 395 U.S. at 31-32. Judgments of conviction must occasionally be vacated or reversed on this theory where the charge contained only one erroneous instruction. See, e.g., Cool v. United States, 409 U.S. 100, 102-03 (1972). However, a judgment of conviction will not be rendered constitutionally infirm by one deficient instruction if the charge, when considered as a whole, clearly informs the jury of the correct legal principle. Henderson v. Kibbe, 431 U.S. 145, 153 (1977); see Cupp v. Naughten, supra, 414 U.S. at 147.

Appendix B, at 8-9.

Applying these principles to petitioner's case, the District Court found that the trial court's twice repeated instruction -- "[a] person is presumed to intend the natural and probable consequences of his act" -- violated Sandstrom. Appendix B, at 9. As the District Court reasoned: "once the jury found that serious physical injury to Guy Keyes was a natural and probable consequence of an act performed by Rivera, the jury was then

required to find that Rivera had the requisite intent to cause Guy Keyes serious physical injury. Thus, [these instructions]. . . reasonably could have been understood by the jury to describe a constitutionally impermissible conclusive mandatory presumption."[4] Appendix B, at 9. There were, the District Court observed, other portions of the intent charge which described a permissive inference as to intent, namely those stating that the jury had "the right" to "infer" intent from the facts and "circumstances" in the case. Appendix B, at 10. But these instructions merely provided the jury with a constitutional "alternative" to the unconstitutional presumption, an "alternative" which the District Court could not be certain the jury employed. Appendix B, at 10. As Sandstrom's own analysis established, 442 U.S. at 525-26, because of such uncertainty, a "charge as a whole" (Cupp v. Naughten, supra, 414 U.S. 141) analysis could not save the defective intent instructions. Appendix B, at 8-9. Finally, the District Court concluded that the unconstitutional instructions could not be deemed harmless beyond a reasonable doubt, noting, inter alia, that petitioner's intent was contested. Appendix B, at 18.

By a two to one vote, a panel of the Court of Appeals for the Second Circuit reversed Judge Ward's order. 683 F.2d 697 (1982). Appendix A. "[V]iewing the charge as a whole," the majority (Lumbard and Moore, C.J.J.) found that the jury was told "to weigh all the circumstances in determining whether Rivera had the requisite

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4 As noted ante, at pp. 1 and 2, the requisite intent for second degree murder under N.Y. Penal Law §125.25(1) is the intent to cause death; for first degree manslaughter under N.Y Penal Law §125.20(1) (of which petitioner was convicted), it is the intent to cause serious physical injury.

intent and that it was entitled to infer intent from his acts." Appendix A, at 4. Specifically, the Court of Appeals acknowledged that the "natural consequences" instruction "could be construed as mandatory" (Appendix A, at 5); and it apparently conceded impropriety in the trial court's closing words on intent, which were: "thus the mind is compelled from necessity to refer to the act and physical manifestations of the intent exhibited by the results produced as the safest if not the only proof of the fact to be ascertained." Appendix A, at 5-6. But, the majority maintained, the trial court's "right to infer" and "circumstances" language overcame the objectionable instructions.[5] Appendix A, at 5. In the majority's opinion, petitioner's conviction for first degree manslaughter was the "best [he] could expect," and it also established that his jury did not rely on the challenged instructions. Appendix A, at 6.

The dissenter (Oakes, C.J.) observed that, by using the "debatable" "charge as a whole" analysis of Nelson v. Scully, supra, 672 F.2d 266, the majority had done nothing less than "scuttle the Court's unanimous decision" in Sandstrom. Appendix A, at 6, 7. Reprising Judge Ward's opinion, the dissent emphasized that because the trial court "hammered in both permissive and mandatory concepts," there was no assurance that the jury did not rely on the mandatory ones. And it was just such a lack of assurance, as Sandstrom instructed, 442 U.S. at 519, which rendered unconstitutional the instructions challenged in petitioner's case. Appendix A, at 7-8.

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5 In support of its conclusion, the majority cited the holding of Nelson v. Scully, 672 F.2d 266 (2nd Cir. 1982), cert. denied, 50 U.S.L.W. 3948 (June 1, 1982), which found no constitutional error in a "natural consequences" intent instruction. Appendix A, at 5.

On August 23, 1982, the Second Circuit denied petitioner's request for rehearing, Judge Oakes dissenting. With respect to petitioner's concomitant suggestion for rehearing en banc, the Circuit's order noted that no member of the court had requested that a vote be taken.

REASONS FOR GRANTING THE WRIT

At his trial for second degree (intentional) murder, petitioner's jurors were twice instructed, as to the intent element of the crime, that "a person is presumed to intend the natural and probable consequences of his act." These instructions were essentially a verbatim recitation of the instruction condemned in Sandstrom v. Montana, 442 U.S. 510 (1979). Nevertheless, viewing the trial court's "charge as a whole," the majority of the Court of Appeals for the Second Circuit concluded that the jury was told merely "to infer intent from [petitioner's] acts," and that the intent charge was thus constitutional. Appendix A, at 4. The Second Circuit has employed this "charge as a whole" test, to excuse language which plainly runs afoul of Sandstrom, in virtually every Sandstrom - based case which has come before it on habeas corpus review of a state conviction. The Seventh Circuit has also used the analysis in the same fashion, but the Eighth Circuit has not. Because this analysis, purportedly based on Cupp v. Naughten, 414 U.S. 141 (1973), conflicts with the analysis set forth in Sandstrom, and because the "charge as a whole" analysis is itself in dispute, petitioner's case merits this Court's review.

As this Court emphasized repeatedly in Sandstrom, its touchstone was "the way in which a reasonable juror could have interpreted the instruction." 442 U.S. at 514. Accordingly, the Court did not "reject" the "possi-

bility" that Sandstrom's jurors could have understood the "ordinary consequences" intent charge as describing a permissive inference. But because it also could not "discount" the "possibility" that the jurors apprehended the instruction as a mandatory, conclusive or burden-shifting presumption, the Court held the instruction violative of due process. Id. at 510. In the same vein, the Court rejected the state's argument that the jurors may have convicted Sandstrom on the basis of "knowlege" as the mental state and therefore did not rely on the unconstitutional instruction, which was relevant only as to "purpose" as a mental state. Id. at 525. First, the Court countered by suggesting that the jury probably considered only "purpose," because the unconstitutional presumption made that an easier task than evaluating "knowlege." Id. at 526 n. 13. In any event, the state's argument was untenable because the Court could not be certain about the jury's deliberative process. Id. at 526. Quoting from Leary v. United States, 395 U.S. 6, 31-32 (1969), the Sandstrom Court thus concluded: "'[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside.'" 442 U.S. at 526.

In petitioner's case, the District Court applied precisely this "reasonable juror" - "possibility" analysis in finding the intent instructions violative of due process. As the dissent below suggested, had the Court of Appeals majority likewise applied it, the District Court's granting of habeas corpus relief would have been affirmed. To be sure, petitioner's jurors were twice told that they had "the right" to "infer" intent from all the "circumstances" in the case, and they were also told that intent was a "question of fact" to be determined by

them and proved by the prosecution beyond a reasonable doubt. But, these permissive instructions aside, they were also twice charged the bald, and impermissible, "natural consequences" presumption. Furthermore, at the conclusion of the intent instructions, they were told that "the act and the physical manifestations of the intent exhibited by the results produced [are] the safest if not the only proof of the fact to be ascertained" -- words which powerfully restated the presumption. Given these disparate instructions, the possibility cannot be discounted that a reasonable juror applied the unconstitutional ones. Indeed, the possibility is substantial, for employing the presumption would have been easier than evaluating the circumstances and drawing inferences. Cf. Sandstrom v. Montana, supra, 442 U.S. at 526 n. 13.

But the majority eschewed this analysis. Instead, it perfunctorily noted that the trial court's recital of the "natural consequences" presumption "could be construed as mandatory," and it merely recognized that the final "results produced" language was improper. Appendix A, at 5, 6. These unconstitutional instructions thus summarily dispensed with, the majority recited the permissive ones. Never acknowledging the possibility that the jurors could have seized on the defective instructions, the court concluded that the "charge as a whole" was proper.[6]

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[6] To support its conclusion, the majority noted that petitioner was acquitted of second degree murder and convicted of only first degree manslaughter [N.Y. Penal Law §125.20(1); with intent to cause serious physical injury, causes death]. According to the majority, the "natural consequence" of petitioner's alleged act -- inflicting a 5" stab wound in the deceased's back -- was death. From this, the court reasoned that petitioner's acquittal of intentional murder meant that the jury disregarded the impermissible presumption instructions. Appendix A, at 6. The court's reasoning, however, further demonstrates

(Footnote Continued)

As the majority intimated (Appendix A, at 5), and the dissent made clear (Appendix A, at 6-8), the source of the majority's "charge as a whole" analysis was Nelson v. Scully, 672 F.2d 266 (2nd Cir. 1982), cert. denied, 50 U.S.L.W. 3948 (June 1, 1982), which also involved a state prisoner's collateral attack on a conviction because of an alleged Sandstrom violation. Nelson itself, 672 F.2d at 268, 271-72, relied on Cupp v. Naughten, supra, 414 U.S. 141, as mandating such a test. There, this Court stated:

> [A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . . [T]he question is not whether the

(Footnote Continued)

its disregard of Sandstrom's "reasonable juror" - "possibility" analysis. A reasonable juror may well have concluded that a "natural consequence" of petitioner's act was the causing of serious physical injury, and that the deceased's death was an unexpected result. The presumption therefore may have been used to reach the first degree (intentional) manslaughter conviction.

Nor, contrary to the majority's implicit harmless error analysis, was a first degree manslaughter conviction "the best [petitioner] could expect once the jury found that he had in fact stabbed Keyes in the back." Appendix A, at 6. The evidence of petitioner's intent was far from overwhelming. The state's witnesses placed petitioner as Ms. Castro's protector when the drunk Keyes bothered her, in the crowd outside the Aida Superette when the bullying Keyes arrived looking for "trouble," and in the group chasing Keyes away. In his testimony, petitioner admitted as much. But the only direct evidence about the stabbing -- petitioner's statement in the store, "I think I stabbed him in the back" -- far from proving specific intent, indicated petitioner's incredulity at what had occurred and even unawareness of the stabbing until it was over. Indeed, because the stabbing occurred during a chase, it is as likely that Keyes came in contact with the knife by stopping suddenly and causing petitioner to collide with him, or that petitioner tripped, stumbled or fell into Keyes. The medical evidence was equally consistent with any of these interpretations, all of which suggested the absence of intent to cause serious physical injury. That the trial prosecutor thought intent was seriously at issue was demonstrated by his consent to defense counsel's request to charge second degree (reckless) manslaughter and criminally negligent homicide.

(Footnote Continued)

> trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.

Id. at 146-47. Accord, Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (noting that the "overall charge" analysis is particularly applicable upon federal review of a collateral attack on a state court judgment). Significantly, however, this analysis was used in Cupp to determine whether the instruction at issue there -- "every witness is presumed to speak the truth" -- was constitutional error in the first place. This Court determined that, standing alone, it was not: "Certainly the instruction by its language neither shifts the burden of proof nor negates the presumption of innocence. . . ." Cupp v. Naughten, supra, 414 U.S. at 148. The Court then went on to observe that the other instructions -- including those as to the presumption of innocence, and that the jury should consider each witness's demeanor, possible motive to lie, and whether he was otherwise impeached -- conclusively negated any conceivable "theoretical" harm caused by the challenged instruction. Id. at 149.

Beginning with Nelson v. Scully, supra, 672 F.2d 266, the Second Circuit has purportedly applied Cupp's "charge as a whole" test in reviewing the Sandstrom challenges of state prisoners. But the Circuit had interpreted Cupp in a sweeping, and apparently erroneous, manner, using Cupp's analysis to uphold instructions which, under Sandstrom, are constitutional error in the

(Footnote Continued)

We would also note that the question whether Sandstrom error is even susceptible of harmless error analysis is pending before the Court. State v. Johnson, 440 A.2d 858 (Conn. 1981), cert. granted sub nom. Connecticut v. Johnson, 50 U.S.L.W. 3648 (Feb. 22, 1982) (No. 81-927).

first place, and using it in derogation of Sandstrom's own analysis. For example, in Nelson, the court was confronted with a charge arguably more offensive than the one delivered in Sandstrom:

> Also, there is a principal [sic] of law upon which you may wish to rely in determining a person's intent, and that is, a person is presumed to intend the natural and probable consequences of his acts. A person cannot, for example, throw someone off the roof of an apartment building and then say he was merely conducting an experiment in aerial dynamics.

672 F.2d at 268. Ignoring Sandstrom's "reasonable juror" -- "possibility" test, the Nelson majority excused the charge:

> To be sure, a trained lawyer possessing the analytical skill of our dissenting brother could parse the instruction as saying that the jury was free to rely or not to rely on the principle of law mentioned by the judge but that if it made the former choice, it would then be compelled to find that Nelson had the necessary intent unless he produced evidence to overcome the presumption. But this is attributing altogether too much legal acumen to the ordinary juror -- who had not imbibed Wigmore's Evidence with his mother's milk. . . . [The example] was so extreme that its effect could only have been to lead the jury to choose not to rely on the principle of law in this case.

Id. at 271. After then noting that, in any case, the trial court also "listed facts and circumstances" from which the jury could "inferentially" determine the defendant's intent, id. at 272, the majority held: "We thus cannot conclude that the two offending sentences, taking about thirty seconds to deliver, 'so infected the entire trial that the resulting conviction violates due process.' Cupp v. Naughten, supra, 414 U.S. at 147." 672 F.2d at 272. Similarly, in Mancuso v. Harris, 677 F.2d

206, 210-11 (2nd Cir. 1982), petition for cert. filed, Aug. 16, 1982 (No. 82-5239), where the trial court charged the mandatory presumption but also charged on intent in permissive terms, application of the Nelson-Cupp "charge as a whole" test led to a finding of no constitutional error. And, in Langone v. Smith, 682 F.2d 287, 289-90 (2nd Cir. 1982) (Oakes, C.J., dissenting from a denial of rehearing en banc),[7] this test was deemed to save an intent charge which concluded with a flat statement of the presumption, specifically directed to the defendant and immediately followed by the trial court's asking the jury, "Is that clear?"

It is the Circuit's method of applying Cupp which is irreconcilable with the standard of analysis in Sandstrom. In his dissent in petitioner's case, Judge Oakes called the Nelson-Cupp analysis "debatable." Appendix A, at 7. Presumably, this view also led him to dissent from the Circuit's denial of a rehearing in petitioner's case. Judge Oakes earlier had expressed his opinion in stronger terms in dissenting from a denial of a rehearing en banc in Langone v. Smith, supra, 682 F.2d 287. There, he stated:

> The application of Cupp v. Naughten in this fashion simply reads Sandstrom out of the United States Reports. . . .
>
> The issue should be resolved by this circuit en banc. We have been reviewing Sandstrom claims on the order of one per sitting, and the opinions of the district judges evidence considerable confusion about how to apply both Sandstrom and the majority opinion in Nelson v. Scully, which the district judges perceive to be in conflict.

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[7] The Circuit's main opinion in the case, a summary order, is not reported.

Id. at 290.[8]

The Seventh Circuit has invoked the "charge as a whole" analysis in similar fashion, to excuse what would otherwise appear to be a Sandstrom violation. Thus, in Jacks v. Duckworth, 651 F.2d 480, 485-87 (7th Cir. 1981), it upheld the instruction "every one is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such as to indicate the absence of such an intent." In so doing, the court relied on Henderson v. Kibbe, supra, 431 U.S. at 154, one of Cupp's progeny. In contrast, the Eighth Circuit (like the dissent below and the District Court in petitioner's case) has not applied Cupp so broadly in passing on claimed Sandstrom error. Specifically, in Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981), the court acknowledged Cupp's admonition not to view a challenged

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[8] Despite this "confusion," also evidenced by the District Court's and Judge Oakes's strict application of Sandstrom's analysis to petitioner's case, the Second Circuit has not granted en banc review of the issue. That the Circuit has found Sandstrom error in two cases neither lessens the confusion nor establishes the correctness of its broad "charge as a whole" approach. In one, Arroyo v. Jones, 685 F.2d 35 (2nd Cir. 1982), petition for cert. filed, Sept. 21, 1982 (No. 82-521), the court was constrained to find constitutional error because the offending "natural consequences" instruction was delivered solely during the supplemental charge, which resulted in a verdict of guilty a mere twenty-five minutes later. Because a "supplemental charge must be viewed in a special light," id. at 39, the Circuit carved an exception to Nelson's "charge as a whole" test. In the other case, Ramirez v. Jones, 683 F.2d 712 (2nd Cir. 1982), petition for cert. filed, Oct. 1, 1982 (No. 82-504), in which the main charge was at issue, the court was confronted with insructions virtually identical to those delivered in petitioner's case: the challenged ones included two recitations of the "natural consequences" presumption, and one "results produced" instruction; the putatively curative ones contained the permissive "right to infer" and "circumstances" language. Applying Nelson's test, the Circuit panel (Kearse and Pierce, C.J.J.; Leval, D.J.) (different from the one in petitioner's case) unanimously concluded that the challenged instructions violated due process. That the court's "charge as a whole" analysis has led to such disparate and irreconcilable results suggests that the analysis is itself unprincipled.

instruction in isolation. Id. at 130. But it went on to observe that Sandstrom noted that other instructions did not necessarily mitigate the damaging effect of a conclusive or burden-shifting presumption. Indeed, the Court of Appeals opined that

> it would seem highly probable that a burden-shifting or conclusive presumption is the type of instruction contemplated in Cupp v. Naughten as constitutional error by itself. This is not to say that there would never be a case where other instructions could "mitigate" the error, but only an unlikelihood of such a possibility.

Id. at 131. Accordingly, the court held unconstitutional a jury instruction essentially identical to the one upheld in Jacks. Id. at 128, 131. And it did so despite the trial court's also having given the permissive instruction that intent was to be "determined from all the evidence, facts and circumstances in the case." Id.

In sum, the Second Circuit's sweeping "charge as a whole" analysis conflicts both with the Eighth Circuit's analysis and with that in Sandstrom itself. To resolve the conflict, petitioner's case should be accorded this Court's full plenary review.

CONCLUSION

A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

of the witness' possible motives for testifying falsely in favor of the government." *United States v. James*, 609 F.2d 36, 47 (2 Cir. 1979), *cert. denied*, 445 U.S. 906, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1979). In *James*, the jury knew that the witness had cooperated with the government in another case and that he had not been indicted despite his involvement. We held that it was not reversible error for the judge to refuse to admit evidence of deals with the government. *Accord, United States v. Singh*, 628 F.2d 758, 763 (2 Cir.) ("A trial court is allowed wide discretion in the management of the cross-examination of witnesses."), *cert. denied*, 449 U.S. 1034, 101 S.Ct. 609, 66 L.Ed.2d 496 (1980).

Here, the jury knew that Harris and Bell were friends, possibly lovers. They could infer that, if she was associated with an admitted bank robber, she was not of outstanding character and might be inclined to lie. Since Bell and Harris lived together from time to time, the jury could infer that, because Bell had a motive to testify against appellant, so did Harris. Moreover, Harris was not the only witness who testified that appellant was involved in the robbery.

I would affirm appellant's conviction and 12-year sentence for armed bank robbery. From the majority's refusal to do so, I respectfully dissent.

KEY NUMBER SYSTEM

Edwin RIVERA, Petitioner-Appellee,

v.

Philip COOMBE, Jr., Superintendent, Respondent-Appellant.

No. 1228, Docket 82-2086.

United States Court of Appeals, Second Circuit.

Argued May 27, 1982.

Decided June 29, 1982.

Prisoner filed a petition for a writ of habeas corpus. The United States District Court for the Southern District of New York, Robert J. Ward, J., 534 F.Supp. 980, granted relief and state appealed. The Court of Appeals, Lumbard, Circuit Judge, held that a charge directing the jury to weigh all the circumstances in determining whether defendant had the requisite intent to kill and providing that it was entitled to infer intent from his acts did not impermissibly shift burden of proof to defendant.

Reversed with directions.

Oakes, Circuit Judge, filed a dissenting opinion.

1. Constitutional Law ⇐268(11)

Charging jury that it must presume element of offense from some other fact violates defendant's right to due process by relieving prosecution of its duty to prove all elements of offense, or by impermissibly shifting burden of proof to defense.

2. Criminal Law ⇐778(5)

Charge directing jury to weigh all circumstances in determining whether defendant had requisite intent to kill and providing that it was entitled to infer intent from his acts did not impermissibly shift burden of proof to defendant.

3. Criminal Law ⇐1172.1(2)

In homicide prosecution, jury instruction that defendant, if guilty, had motive to lie and that most accurate means of determining intent was to consider objective fact of what defendant did rather than what defendant testified to was, at most, harmless error, since defendant gave no testimony regarding intent, but insisted that he had not stabbed the victim.

Daniel Kinburn, Asst. Atty. Gen., New York City (Robert Abrams, Atty. Gen. of the State of N. Y., Gerald J. Ryan, Asst. Atty. Gen., New York City, of counsel), for respondent-appellant.

Judith L. Turnock, Legal Aid Soc., New York City (William E. Hellerstein, New

York City, of counsel), for petitioner-appellee.

Before LUMBARD, MOORE and OAKES, Circuit Judges.

LUMBARD, Circuit Judge:

In 1974, the petitioner, Edwin "Teddybear" Rivera, stabbed a man in the back and killed him. He was subsequently convicted of first-degree manslaughter after a jury trial in the Bronx County Supreme Court. On February 11, 1982, the Southern District of New York, Ward, J., 534 F.Supp. 980, granted Rivera's petition for a writ of habeas corpus, holding that the trial court's instruction on intent violated Rivera's right to due process of law under *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). We disagree and we reverse.

I.

On the evening of February 28, 1974, Guy Keyes, Jr., came up to seventeen-year-old Rosaria "Coochie" Castro in front of the Carvel store on Boston Road in the Bronx. Rivera, then sixteen, was with Coochie. Keyes, a twenty-two-year-old black man, asked her for a cigarette and "a nickel or a dime." She gave him the cigarette but told him she had no money, and Keyes started arguing with her and Rivera. She then asked Rivera to take her back to her grandmother's store, the Aida Superette, located just down the block. Rivera escorted her there but remained outside.

About ten minutes after Coochie returned to the store, Keyes entered the Superette with two other black men. Like Keyes, they were each about six feet tall. Keyes announced "We are looking for trouble." Coochie and her grandmother began yelling at the three men, telling them to get out, "We don't want no trouble." Coochie's brother, John Velez, heard the yelling and came out of the back room of the store to see what the fuss was about. He saw Keyes and the others leaving, and he followed them out to fight with Keyes, taking his shirt off as he went.

As Velez exited the store, Keyes's two companions were holding Keyes back. A crowd (including Rivera) gathered on the sidewalk. Velez demanded that Keyes fight, but his grandmother and Coochie pushed him back into the store before a fight started.

When Velez next looked out the window of the store, Keyes and the other two black men were gone. He saw Keyes running, turning east on 174th Street from Boston Road. A number of people, including Rivera, were following him.[1] Velez testified that Rivera was about 70–80 feet behind Keyes but that Rivera was "running fast." He lost sight of the chase after everyone turned the corner. Velez never saw Keyes again.

Within about ten minutes, Rivera returned to the Superette. On the way, he saw his friend, Jose Mendez, outside on the street, and told Mendez, "I think I stabbed him in the back." Rivera then entered the Superette, where he displayed a three to four inch knife with a rounded tip and blood on the handle. According to Velez, after showing the knife, Rivera announced, "I think I stabbed him," later adding that it was in the back. Velez also testified that Rivera appeared intoxicated.

At about the same time, Guy Keyes staggered into a liquor store on 174th Street, where he collapsed on the floor. He was taken to a hospital where he died the next day of a single penetrating stab wound four to five inches deep. The knife had entered two and a half inches from the spine on the right side of his back and had traveled down and forward, through the lung, terminating against the spine. The pathologist testified that such a wound could have been caused by an individual running up behind another individual, catching up to him, and plunging a knife like Rivera's in with a downward thrust.

1. One witness, Jose Mendez, testified that Rivera was the only person running after Keyes. Velez testified that there was "a couple of people running," but admitted he couldn't be sure it wasn't three or four.

Rivera took the stand in his own defense. He admitted running after Keyes, but denied chasing Keyes with the intent of stabbing him, denied stabbing Keyes, denied ever telling anyone that he had stabbed Keyes, and denied possessing or displaying a knife. He insisted that he followed Keyes only to the corner and had there lost sight of him. Finally, Rivera stated that he had drunk no liquor whatsoever the night that Guy Keyes was stabbed.

Justice Ivan Warner charged the jury on the elements of second-degree murder, first-degree manslaughter, and misdemeanor weapon possession. The relevant instruction here concerns intent, which Justice Warner defined as follows:

> I shall now define intent for you. A person is presumed to intend the natural and probable consequences of his act. Criminal intent is an intent to do knowingly and wilfully that which is condemned as wrong by the law. A criminal intent may be inferred from all the circumstances of the case. It need not be established by direct proof. To constitute the crime there must not only be the act but also the criminal intent and these must occur, the latter being equally essential with the former. The existence of criminal intent constitutes a question of fact for determination by you and the burden of showing intent, the intent with which a crime has been committed rests upon the prosecution to establish it by evidence beyond a reasonable doubt. So where the law requires that the People must establish a specific or certain intent on the part of one charged with the commission of a crime, the law does not expect or require for obvious reasons that intent must be proved by directed proof to an absolute certainty or with mathematical precision. Intent, I mean criminal intent, is always an essential element to the commission of the crime such as we have here and it may be proved by direct evidence or it may be proved from circumstances surrounding the transaction or the act itself, or it may be proved by a combination of both. What is intent? Intent is a frame of mind of the perpetrator of the act at the time he commits it. You must probe the mind. You may say to yourself how are we to determine what a man's intentions are. Well members of the jury, we can only determine that by his acts, by his conduct, by what he says and by what he does. You should consider what he allegedly did, what means he allegedly employed, the type of instrument allegedly used, if any, the part of the body allegedly attacked, and all the circumstances. And from these surrounding circumstances you are to determine the intention of the defendant at the time.
>
> Under our law every person is presumed to intend the natural and inevitable consequences of his own voluntary acts and unless such acts were done under circumstances which would preclude the existence of such intent, the jury has a right to infer from the results produced, the intention to effect such result. The intent formed, is a secret and silent operation of the mind and its physical manifestations, the accomplishment of the thing determined upon. The individual whose intent is sought to be ascertained may remain silent or if he speaks, may probably will if he has a crime to hide, speak untruthfully, and thus the mind is compelled from necessity to refer to the act and the physical manifestations of the intent exhibited by the results produced as the safest if not the only proof of the fact to be ascertained.

Justice Warner followed this with an instruction concerning the difference between the intent required for murder and manslaughter, explaining that second-degree murder requires proof of intent to kill and first-degree manslaughter requires proof of intent to cause serious bodily injury. He also charged the jury at length on reasonable doubt and the presumption of innocence, emphasizing that "[t]he burden of establishing the guilt of the defendant beyond a reasonable doubt rests upon the prosecution and that burden never shifts."

Rivera did not object to the charge on intent.

The jury acquitted Rivera of second-degree murder, N.Y.Pen.L. § 125.25, and convicted him of first-degree manslaughter, N.Y.Pen.L. § 125.20(1), and misdemeanor possession of a weapon, N.Y.Pen.L. § 265.01(2). On September 12, 1975, the court sentenced Rivera to a prison term of seven to twenty-one years. He is presently free on parole.

Rivera's conviction was affirmed without opinion, 59 A.D.2d 829, 398 N.Y.S.2d 351 (1st Dep't 1977), and leave to appeal to the New York Court of Appeals was denied, 43 N.Y.2d 799, 402 N.Y.S.2d 1037, 373 N.E.2d 299 (1977). On November 28, 1979, Justice Warner denied in a written opinion Rivera's post-conviction motion to vacate the judgment. Stating that "the real issue at the trial was not actually one of intent to kill, but rather, whether or not Edwin Rivera had committed the crime at all," Justice Warner held that the charge on intent did not impermissibly shift the burden of proof to the defendant. Leave to appeal was denied by the Appellate Division. Rivera filed his petition for a writ of habeas corpus on December 31, 1980.

On February 11, 1982, the district court granted the writ and vacated the conviction, finding that the charge on intent shifted the burden of proof to Rivera in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). First, it found that portions of the charge could have been understood by the jury as requiring rather than merely permitting a finding of intent to commit serious bodily injury once the jury found that Rivera committed an act the natural and probable consequence of which was serious bodily injury (*i.e.*, that Rivera stabbed Keyes in the back). Second, even though the charge contained other language indicating that a finding of intent was permissive and not mandatory, the court could not say that the charge as a whole "clearly informed the jury of the correct rule of law" because the permissive inference instruction was not "necessarily rhetorically inconsistent with a constitutionally invalid interpretation of the judge's earlier conclusive mandatory presumption instruction."

II.

[1] The general principle that we must apply here is not in dispute. Charging a jury that it must presume an element of an offense from some other fact violates a defendant's right to due process of law by relieving the prosecution of its duty to prove all the elements of the offense, *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), or by impermissibly shifting the burden of proof to the defense, *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). Applying this principle, the Court in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), held that the trial court violated the petitioner's right to due process when it charged the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts."

In *Sandstrom*, the defendant admitted killing the deceased; charged with deliberate homicide, his only defense was that he lacked the specific intent to kill due to "a personality disorder aggravated by alcohol consumption. . . ." 442 U.S. at 512, 99 S.Ct. at 2453. Because no language in the charge indicated that the inference of intent was permissive, the court found it "clear that a reasonable juror could easily have viewed such an instruction as mandatory," 442 U.S. at 515, 99 S.Ct. at 2454, and held that a mandatory presumption was unconstitutional whether the jury understood the instruction as constituting either a conclusive or a rebuttable, burden-shifting presumption. 442 U.S. at 524, 99 S.Ct. at 2459.

[2] Here, by contrast, viewing the charge as a whole, the trial judge charged that the jury was to weigh all the circumstances in determining whether Rivera had the requisite intent and that it was entitled to infer intent from his acts. Thus, unlike the abbreviated charge on intent in *Sandstrom*, the charge on intent quoted above, did not either shift the burden of proof to the defendant or remove the issue of intent from the jury's consideration.

The judge began by telling the jury that "[a] person is presumed to intend the natural and probable consequences of his acts." Although the phrase "is presumed" could be construed as mandatory, *see Sandstrom, supra*, the sentence was closely followed by the instruction that "criminal intent may be inferred from all the circumstances of the case." The use of the permissive construction "may be inferred" indicated that the finding of intent was in the jury's discretion. That the defendant had no duty to rebut a mandatory inference of intent was emphasized by the court's next instruction that the "existence of criminal intent constitutes a question of fact for determination by you and the burden of showing intent . . . rests upon the prosecution. . . ." The court then returned to the jury's duty to look at all the facts, stating that intent may be proved by direct evidence, by "circumstances surrounding the transaction or the act itself, or it may be proved by a combination of both." It explained that they could look at the defendant's acts, the instrument that he allegedly employed, and "all the circumstances. And from these surrounding circumstances you are to determine the intention of the defendant at the time." We are hard pressed to see how the jury could have understood these repeated instructions to consider all the evidence in determining intent as requiring it to find intent to kill or to cause serious bodily injury if it found that death or serious injury was the natural and probable consequence of the stabbing.[2]

The next sentence lends even less support to petitioner's claim. The judge told the jury that "[u]nder our law every person is presumed to intend the natural and inevitable consequences of his own voluntary acts and unless such acts were done under circumstances which would preclude the existence of such intent, the jury has a right to infer from the results produced, the intention to effect such result." This sentence is almost identical to one that we recently held merely instructed the jury as to a permissible method for determining the intent of the defendant. *Mancuso v. Harris*, 677 F.2d 206 (2d Cir. 1982). In *Mancuso* the charge read, in pertinent part: "Everyone is presumed to intend the natural consequences of his act and unless the act is done under circumstances or conditions that might preclude the existence of such intent, you the jury, have to find, have a right to find the requisite intent from the proven actions of an individual." 677 F.2d at 210. Like the *Mancuso* court, we find that the "unless" clause ameliorated any burden-shifting effect of the "natural consequences" clause, and that taken as a whole, this charge "made it quite clear to the jury that it was to consider *all* of the evidence in the case." *Id.* at 211 (emphasis original). *See also Washington v. Harris*, 650 F.2d 447, 453 (2d Cir. 1981).

[3] Finally, the court instructed the jury that the defendant, if guilty, had a motive to lie and that the most accurate means of determining intent was to consider the objective fact of what the defendant did rather than what the defendant testified: "[because the defendant] may . . . speak untruthfully, . . . the mind is compelled from necessity to refer to the act and the physical manifestations of the intent exhibited by the results produced as the safest if not the only proof of the fact to be ascertained." Rivera argues that this amounted to an instruction to ignore his testimony regarding intent and to look only at his acts. However, Rivera did not testify as to his intent in stabbing Keyes. Although he denied *running* after Keyes *with intent to stab* him, Rivera did not testify at all as to his state of mind when he caught up to Keyes and stabbed him in the back,

2. *See also Nelson v. Scully*, 672 F.2d 266 (2d Cir. 1982) where we held that the instruction "a person is presumed to intend the natural and probable consequences of his acts" had been cured by the trial court's repeated emphasis on the prosecution's burden of proof and the jury's obligation to consider all the facts and circumstances, 672 F.2d at 272, even though the trial judge followed the "natural and probable" instruction with a highly prejudicial example: "A person cannot, for example, throw someone off the roof of an apartment building and then say he was merely conducting an experiment in aerial dynamics."

nor did he offer any motive or explanation for the stabbing. Rather, he persistently denied stabbing Keyes. In short, the only evidence the jury had to consider regarding Rivera's intent were the physical facts: the circumstances of the argument in front of the Carvel store and later in the Superette; the face-off in front of the Superette; and the fact that Rivera chased after Keyes, caught up to him, and plunged his knife to the hilt into Keyes's back.[3] Therefore, the instruction to ignore Rivera's testimony regarding his intent was at worst harmless error as he had given no testimony regarding intent. Nor do we believe that this one sentence's emphasis on "the act and . . . the results produced" swept from the jurors' minds the previous instructions to consider all the circumstances and evidence. The simple truth is that on these facts a conviction for manslaughter was the best Rivera could expect once the jury found that he had in fact stabbed Keyes in the back.

Supporting our conclusion that the jury understood the charge to mean that it should weigh all the facts in determining Rivera's intent is the fact that it acquitted Rivera of second-degree-murder. Although death is surely a natural and probable consequence of plunging a knife five inches into the middle of someone's back, the jury, by acquitting Rivera on this count, necessarily found that he lacked the intent to kill. The most reasonable explanation for this discrepancy is that the jury found that in light of all the circumstances Rivera did not intend to kill Keyes even though that was the natural and probable consequence of his act.

In conclusion, we find that the charge of intent did not deprive the petitioner of due process of law. Taken as a whole, the charge instructed the jury that it could infer intent from the defendant's acts, but that it should consider all the circumstances in making its finding. Thus, the charge did not shift the burden of proof to the defendant nor remove the issue of intent from the jury's consideration.

The order granting the writ is reversed, with directions to dismiss the petition.

OAKES, Circuit Judge (dissenting):

Recently the Supreme Court in a per curiam opinion chastised another circuit for "having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and the Congress," reminding us that "a precedent of [the Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, — U.S. —, 102 S.Ct. 703, 70 L.Ed.2d 536 (1982). Today my brethren go even further than *Nelson v. Scully*, 672 F.2d 266 (2d Cir. 1982), *cert. denied*, — U.S. —, 102 S.Ct. 2301, 72 L.Ed.2d — (1982), or *Mancuso v. Harris*, 677 F.2d 206 (2d Cir. 1982), to scuttle the Court's unanimous decision in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Because, "consciously or unconsciously," the majority ignores the "hierarchy of the federal court system," I dissent.

Judge Lumbard's opinion says, *inter alia*, that "no language in the [*Sandstrom*] charge indicated that the inference of intent was permissive . . . ." On the contrary, the Supreme Court said in *Sandstrom*, "We do not reject the possibility that some jurors may have interpreted the challenged instruction as permissive, or, if mandatory, as requiring only that the defendant come forward with 'some' evidence in rebuttal." 442 U.S. at 519, 99 S.Ct. at 2456. As here, there were presumption-of-innocence and proof-beyond-a-reasonable-doubt instructions in *Sandstrom*, *id.* at 518–19 n.7, 99 S.Ct. at 2456–57 n.7, that were arguably permissive and qualifying, but the Court

3. Although Rivera now claims that the evidence showed he was intoxicated, intoxication was not raised as a defense at trial. Rivera denied that he had anything to drink the night he killed Keyes; the judge did not charge the jury on intoxication (to which charge Rivera did not object); and Rivera's counsel did not argue intoxication in summation. Of course, the jury was free to consider Velez's testimony that Rivera appeared intoxicated as one of the circumstances bearing on intent.

held that those instructions were "not rhetorically inconsistent with a conclusive or burden-shifting presumption," *id.* What *Sandstrom* condemned was that "a reasonable juror *could* have given the presumption conclusive or persuasion-shifting effect . . . ." *Id.* at 519, 99 S.Ct. at 2456 (emphasis added). The same is true of the instruction here; it must be similarly condemned.

The trial court began its general charge on intent by declaring that "[a] person is presumed to intend the natural and probable consequences of his act." Reasonable jurors could have interpreted this charge, like the charge in *Sandstrom*, as either a conclusive presumption or a burden-shifting presumption on the issue of intent. Interpreting the charge as a conclusive presumption, as Judge Ward said, "once the jury found that serious physical injury to Guy Keyes was a natural and probable consequence of an act performed by Rivera, the jury [would have been] *required* to find that Rivera had the requisite intent to cause Guy Keyes serious physical injury." *Rivera v. Coombe*, 534 F.Supp. 980, 990 (S.D.N.Y.1982) (emphasis in original). Interpreting the charge as a rebuttable presumption, the jurors would have believed that petitioner was obligated to persuade them that he lacked intent. Either interpretation would have deprived petitioner of due process by shifting from the State the burden of proving all elements of the crime beyond a reasonable doubt. *Sandstrom*, 442 U.S. at 519, 524, 99 S.Ct. at 2456, 2459.

Our own circuit has condemned such charges. *See Washington v. Harris*, 650 F.2d 447, 453 (2d Cir. 1981) (charge that "a person intends . . . the necessary and natural consequences of any act he performs" was "constitutionally defective"). So have the First, *United States v. Winter*, 663 F.2d 1120, 1144 (1st Cir. 1981) (instruction not cured by general instructions putting burden on prosecution to prove each element of the crime), the Fifth, *Tyler v. Phelps*, 643 F.2d 1095, 1098–99 (5th Cir. 1981), and the Eighth Circuits, *Dietz v. Solem*, 640 F.2d 126, 131 (8th Cir. 1981), all of whose opinions show more appropriate regard for the Court's holding and reasoning in *Sandstrom* than does the majority here.

Sandstrom, in a footnote, leaves the door ajar for instructions that are "rhetorically inconsistent" with the presumption-of-intent instruction, 442 U.S. at 518–19 n.7, 99 S.Ct. at 2456–57. To be sure, in *Nelson v. Scully*, as persuasively interpreted by Judge Ward, 534 F.Supp. at 993–94 n.5, the panel majority found rhetorical inconsistency in the judge's "hammering" at the jury with permissive language. But even *Nelson's* debatable interpretation of *Sandstrom* can not readily be applied here. The remainder of the charge here, instead of making it clear that the presumption language merely described an inference that the jury was permitted to draw from the commission of an act,[1] contained additional language that reasonable jurors could have interpreted as reinforcing the conclusive or burden-shift-

1. *See Mancuso v. Harris*, 677 F.2d 206, 211 (2d Cir. 1982); *but see United States v. Robinson*, 545 F.2d 301 (2d Cir. 1976). The charge upheld in *Mancuso* reads:

> Everyone is presumed to intend the natural consequences of his act and unless the act is done under circumstances or conditions that might preclude the existence of such intent, you, the jury, have to find, have a right to find the requisite intent from the proven actions of an individual.

At 210. But in *Robinson*, decided before *Sandstrom*, Judge Meskill said for a unanimous panel:

> Thus, the "natural and probable consequences" charge, particularly when, as here, it contains the phrase "unless the contrary appears from the evidence," is a burden-shifting charge which has the potential for misleading the jury with respect to the requirement that the government must prove every element of an offense beyond a reasonable doubt. *United States v. Barash*, 365 F.2d 395, 402–03 (2d Cir. 1966) (Friendly, J.); *see United States v. Erb*, 543 F.2d 438, 447 (2d Cir. 1976).

545 F.2d at 306.

Arguably, *Mancuso* is in accord with *Washington v. Harris*, 650 F.2d 447, 453 (2d Cir. 1981) ("you may infer . . . unless the act was done under circumstances to preclude the existence of such intent") on this point. It is, of course, the inconsistency I see in this court's decisions as well as the failure of some of them to follow *Sandstrom* that precipitated my dissent from the denial of rehearing *en banc* in *Langone v. Smith*, 682 F.2d 287 (2d Cir. 1982).

ing presumption.[2] Since the judge did not nail down for the jurors the correct rule of law, but rather hammered in both permissive and mandatory concepts, some jurors could have based their verdicts on the impermissible rule. "[T]he fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that [Rivera's] jurors actually did proceed upon one or the other of these latter interpretations." *Sandstrom*, 442 U.S. at 519, 99 S.Ct. at 2457. It is the *possibility*, *Sandstrom* emphasizes, that is of concern; probability that the jury was misled is not required.

Contrary to the point made in Judge Lumbard's opinion, the jury's acquittal of Rivera on the murder count in no way shows that the erroneous instruction was harmless. The jury could have found that the natural and probable consequence of Rivera's act was to cause serious physical injury, but not to kill. Applying the mandatory presumption, the jury therefore could have found that Rivera had the requisite intent for a first-degree manslaughter conviction, even though neither the presumption nor the other evidence convinced the jury that he acted with the intent to kill.

I would in short affirm Judge Ward, whose carefully crafted opinion is a model of proper deference to the "hierarchy of the federal court system." I regret that the majority opinion here rejects that opinion and goes its own way, upholding an instruction that, as a whole, is more egregious than the one condemned in *Sandstrom* itself.

2. The first sentence of the second paragraph of the charge in this case is within *Mancuso*, *see* note 1 *supra*, although, to me, contrary to *Robinson*. *Mancuso* is not controlling, however, because there the *only* challenged language was the phrase quoted in note 1. Here the lead-in sentence to the intent charge contained *Sandstrom*-condemned mandatory language, and language later in the second paragraph, by stressing the importance of "the act and the physical manifestations of the intent exhibited by the results produced as the safest if not the only proof of the fact to be ascertained," was consistent with and reinforced the mandatory presumption language.

STANDARD & POOR'S CORPORATION, INC., Plaintiff-Appellee,

v.

COMMODITY EXCHANGE, INC., Defendant-Appellant.

No. 1373, Docket 82-7377.

United States Court of Appeals, Second Circuit.

Argued June 16, 1982.

Decided June 29, 1982.

Compiler of popular stock index brought action to enjoin futures exchange from trading its futures contracts based on use of plaintiff's name or plaintiff's stock index. The United States District Court for the District of New York, 538 F.Supp. 1063, Milton Pollack, J., granted injunction, and defendant appealed. The Court of Appeals, Pierce, Circuit Judge, held that: (1) trial judge did not abuse his discretion in finding likelihood of confusion as to source or sponsorship of futures exchange stock index futures contracts; (2) plaintiff's claim of misappropriation presented sufficiently serious questions going to merits to make them fair ground for litigation; (3) trial judge did not err in finding balance of hardships tipped decidedly toward plaintiff; and (4) protection of public was strong ground for maintenance of preliminary injunction.

Affirmed.

Newman, Circuit Judge, concurred and filed opinion.

Whitman Knapp, District Judge, sitting by designation, concurred in result for

APPENDIX B

OPINION OF THE DISTRICT COURT

U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672 (1980); *United States v. Iaconetti*, 540 F.2d 574, 578 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977); *United States v. Bailey*, 581 F.2d 341, 348 (3rd Cir. 1978); *United States v. Leslie*, 542 F.2d 285 (5th Cir. 1976).

III. *Conclusion*

[2] Gollender's out-of-court statement was properly admitted. Whether or not this extrajudicial declaration is denominated hearsay turns on how one characterizes its function in the development of the government's case. It may be viewed as admissible hearsay, non-hearsay evidence-in-chief, or non-hearsay insofar as it is admissible on the issue of credibility. Admission of evidence of this sort does not derive its ultimate justification from any one theory, but from notions of reliability and the ability of the trier to properly evaluate probative force.

Absent a constitutional issue of confrontation—and there is none here—the central question is whether the jury could accurately evaluate the probative value of Gollender's out-of-court statement. Essentially this is an issue implicated in Rules 401 to 403, requiring the court's exercise of sound judgment and discretion. *See, e.g., United States v. Barbati*, 284 F.Supp. 409, 413 (E.D. N.Y.1968) ("We cannot permit the mechanical and unreasoned application of the hearsay rule to deny evidence vital for our search for the truth."). In the circumstances of this case there can be no doubt that admitting this evidence enhanced the search for the truth without any possible unfairness or prejudice to the defendant. Motion for a new trial denied.

Edwin RIVERA, Petitioner,

v.

Phillip COOMBE, Jr., Superintendent, Eastern Correctional Facility, and Robert Abrams, Attorney General of the State of New York, Respondents.

Pedro ARROYO, Petitioner,

v.

Everett JONES, Superintendent, Great Meadow Correctional Facility, and Robert Abrams, Attorney General of the State of New York, Respondents.

Nos. 80 Civ. 7447 (RJW), 81 Civ. 1280 (RJW).

United States District Court, S. D. New York.

Feb. 11, 1982.

Petitions for writs of habeas corpus were filed to review state convictions on the basis of allegedly improper "intent" instructions. The District Court, Robert J. Ward, J., held that: (1) instruction in prosecution for first-degree manslaughter that a "person is presumed to intend the natural and probable consequences of his act" was a constitutionally impermissible conclusive mandatory presumption; (2) instruction in prosecution for attempted murder in the first degree that "people are presumed to intend the natural, probable and logical consequences of their acts" was a constitutionally impermissible conclusive mandatory presumption; and (3) giving of the constitutionally impermissible instructions constituted reversible error.

Petitions granted.

1. Criminal Law ⇐324

A defendant's constitutional rights are violated if state law creates an evidentiary device that, either by removing a question of fact from jury's consideration, or by shifting to the defendant the burden of persuasion on a question of fact, relieves the prosecution of its burden of proving

Robert Abrams, Atty. Gen. of the State of N. Y., New York City, for respondents in No. 80 Civ. 7447(RJW); Daniel Kinburn, Deputy Asst. Atty. Gen., New York City, of counsel.

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OPINION

ROBERT J. WARD, District Judge.

The two above-captioned actions were each commenced by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner in 80 Civ. 7447(RJW) (hereinafter referred to as "the *Rivera* action") is Edwin Rivera, presently in the custody of the Attorney General of the State of New York at Eastern Correctional Facility in Napanoch, New York. Petitioner in 81 Civ. 1280(RJW) (hereinafter referred to as "the *Arroyo* action") is Pedro Arroyo, presently in the custody of the Attorney General of the State of New York at Great Meadow Correctional Facility in Comstock, New York. Respondents in the *Rivera* action are Phillip Coombe, Jr., Superintendent of the Eastern Correctional Facility, and Robert Abrams, Attorney General of the State of New York. Respondents in the *Arroyo* action are Everett Jones, Superintendent of the Great Meadow Correctional Facility, and Robert Abrams, Attorney General of the State of New York. The Court hereinafter refers to all three respondents individually and jointly as "the State." Because the *Rivera* action and the *Arroyo* action present very similar factual and legal issues, the Court has determined to deal with both petitions by a single opinion. For the reasons hereinafter stated, both petitions are granted.

BACKGROUND

The procedural histories of the *Rivera* action and the *Arroyo* action may be stated in fairly brief fashion. On September 12, 1973, Rivera was convicted, following a jury trial in the Supreme Court of the State of New York, Bronx County, of manslaughter in the first degree, *see* N.Y.Penal Law § 125.20, and criminal possession of a weapon, *see* N.Y.Penal Law § 265.01(2). Rivera was sentenced to a prison term on the first-degree manslaughter count of from seven to twenty-one years and was unconditionally discharged on the other count. On October 3, 1977, Rivera's manslaughter conviction was affirmed without opinion by the Supreme Court of the State of New York, Appellate Division, First Department. *People v. Rivera*, 59 A.D.2d 829, 398 N.Y.S.2d 351 (1st Dep't 1977). The New York Court of Appeals denied Rivera leave to appeal to that court on November 21, 1977. *People v. Rivera*, 43 N.Y.2d 799, 402 N.Y.S.2d 1037, 373 N.E.2d 299 (1977). Subsequently, on November 28, 1979, the judge who presided at Rivera's state trial denied Rivera's motion, pursuant to N.Y.Crim.Proc. Law § 440.10, to vacate the judgment of conviction for first-degree manslaughter. On February 5, 1980, the Appellate Division denied Rivera leave to appeal the trial judge's denial of this motion. The petition for a writ of habeas corpus that is the subject of today's decision was filed in this Court on December 31, 1980.

Turning to the *Arroyo* action, Arroyo was convicted on April 12, 1973, after a jury trial in the Supreme Court of the State of New York, New York County, of attempted murder in the first degree, *see* former N.Y. Penal Law § 125.30, and four lesser-included counts. Arroyo was sentenced to a prison term on the attempted murder count of from fifteen years to life. He received a sentence of up to seven years in prison on each of the other four counts. These sentences were made concurrent to one another and to the sentence imposed on the attempted murder count. On April 14, 1977, the Supreme Court of the State of New York, Appellate Division, First Department, affirmed Arroyo's conviction for attempted murder, and reversed the conviction on the other four counts on the ground that the counts should have been dismissed upon Arroyo's conviction of the greater-inclusive count of attempted murder. *People v. Ar-*

royo, 57 A.D.2d 523, 393 N.Y.S.2d 570 (1st Dep't 1977). The New York Court of Appeals denied Arroyo leave to appeal to that court on May 12, 1977. *People v. Arroyo*, 42 N.Y.2d 826, 396 N.Y.S.2d 1029, 364 N.E.2d 1347 (1977). Subsequently, on May 19, 1980, the judge who presided at Arroyo's state trial denied Arroyo's motion, pursuant to N.Y.Crim.Proc. Law § 440.10, for an order vacating the judgment of conviction for attempted murder. On September 18, 1980, the Appellate Division denied Arroyo leave to appeal the state trial judge's denial of this motion. The petition for a writ of habeas corpus that is the subject of today's decision was filed in this Court on March 15, 1981.

The petitions filed in the *Rivera* action and the *Arroyo* action each challenge the constitutionality of the state trial judge's jury charge on the subject of intent. Specifically, Rivera objects to the judge's instruction that "[a] person is presumed to intend the natural and probable consequences of his act"; Arroyo challenges the judge's instruction that "people are presumed to intend the natural, probable and logical consequence of their acts." The two petitioners argue, on the basis of these essentially identical instructions, that the juries at their trials could well have understood New York law to permit the prosecution to use a constitutionally impermissible method to establish beyond a reasonable doubt the intent necessary to commit the crimes of which they presently stand convicted. Rivera contends that the trial judge's alleged constitutional error requires that he be given a new trial on the first-degree manslaughter count of which he was convicted; Arroyo contends that the trial judge's alleged constitutional error requires that he be given a new trial on the attempted murder count of which he was convicted.

Analysis of the respective contentions of Rivera and Arroyo requires a fairly detailed recapitulation of their state trials insofar as these trials concerned the issue of intent. The first-degree manslaughter charge against Rivera involved the stabbing death of one Guy Keyes. Keyes died of a knife wound in the back that he apparently received during an altercation on 174th Street in the Bronx. At his trial, Rivera admitted that he, along with a number of other individuals, had participated in an argument with Keyes. He further admitted that he had been among a crowd of people that chased Keyes down 174th Street. However, Rivera denied that he had pursued Keyes with the intent of stabbing him, Transcript at 624, and denied that he had stabbed Keyes, Transcript at 596–97.

The state trial judge charged the jury on second-degree murder, first-degree manslaughter, and criminal possession of a weapon. In so doing, (1) he told the jury that the prosecution had the burden of proving beyond a reasonable doubt all the elements of each crime with which Rivera was charged, Transcript at 820–21, 828, 830–31, (2) he instructed the jury that an essential element of the crime of second-degree murder is "that the defendant formed the *intent* to kill the deceased herein," Transcript 821 (emphasis supplied), and (3) he further instructed the jury that an essential element of first-degree manslaughter is "that the defendant had an *intent* to cause Guy Keyes, Junior, serious physical injury," Transcript at 828 (emphasis supplied). In defining the word "intent," as he used it in the latter two instructions, the state trial judge made the following statement:

> I shall now define intent for you. *A person is presumed to intend the natural and probable consequences of his act.* Criminal intent is an intent to do knowingly and wilfully that which is condemned as wrong by the law. A criminal intent may be inferred from all the circumstances of the case. It need not be established by direct proof. To constitute the crime there must not only be the act but also the criminal intent and these must occur, the latter being equally essential with the former. The existence of criminal intent constitutes a question of fact for determination by you and the burden of showing intent, the intent with which a crime has been committed rests upon the prosecution to establish it by

evidence beyond a reasonable doubt. So where the law requires that the People must establish a specific or certain intent on the part of one charged with the commission of a crime, the law does not expect or require for obvious reasons that intent must be proved by directed [sic] proof to an absolute certainty or with mathematical precision. Intent, I mean criminal intent, is always an essential element to the commission of the crime such as we have here and it may be proved by direct evidence or it may be proved from circumstances surrounding the transaction or the act itself, or it may be proved by a combination of both. What is intent? Intent is a frame of mind of the perpetrator of the act at the time he commits it. You must probe the mind. You may say to yourself how are we to determine what a man's intentions are. Well members of the jury, we can only determine that by his acts, by his conduct, by what he says and by what he does. You should consider what he allegedly did, what means he allegedly employed, the type of instrument allegedly used, if any, the part of the body allegedly attacked, and all the circumstances. And from these surrounding circumstances you are to determine the intention of the defendant at the time.

Under our law every person is presumed to intend the natural and inevitable consequences of his own voluntary acts and unless such acts were done under circumstances which would preclude the existence of such intent, the jury has a right to infer from the results produced, the intention to effect such result. The intent formed, is a secret and silent operation of the mind and its physical manifestations, the accomplishment of the thing determined upon. The individual whose intent is sought to be ascertained may remain silent of [sic] if he speaks, may probably will if he has a crime to hide, speak untruthfully, and thus the mind is compelled from necessity to refer to the act and the physical manifestations of the intent exhibited by the results produced as the safest if not the only proof of the fact to be ascertained. A person acts intentionally with respect to or result to conduct [sic] described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

Transcript at 821–24 (emphasis supplied).

Turning to the *Arroyo* action, the attempted murder charge against Arroyo concerned a gunshot wound received by one Raymond Bernard, a member of the New York City Police Department. Bernard was wounded while attempting to stop a burglary that was in progress at a music store on Third Avenue in Manhattan. At his trial, Arroyo admitted that he had been in the vicinity of the music store on the day in question and that he had taken a gun from one of the police officers who accosted him on that day. However, he testified that he had no recollection of ever firing that gun. Transcript at 630. Sue Lydia Pratts, a witness to the shooting, testified that Arroyo never had a gun at all and that all of the shooting was done by police officers. Transcript at 597–98.

The state trial judge charged the jury on attempted murder and four lesser-included counts. In so doing, she told the jury that the prosecution had the burden of proving beyond a reasonable doubt all the elements of any crime with which Arroyo was charged, Transcript at 762, and she instructed the jury that an essential element of the crime of attempted murder is that "the defendant . . . [acted] with *intent* to cause the death of Raymond Bernard," Transcript at 759 (emphasis supplied). In defining the word intent, as she used it in this instruction, the state trial judge made the following statements:

> What is intent; under our law a person acts intentionally with respect to attempting to cause the death of another person when the alleged perpetrator's conscious objective is to cause such death . . . [O]f course, we all recognize that an intention is a subjective matter and it depends on the operation of an individual's mind none the less it is possible to make a finding of intention based

on objective actions of the alleged perpetrator; in fact, this is the only method that we can use in determining intention since we cannot get into the mind of the alleged perpetrator. Therefore, in your deliberation, you may use the defendant's objective action as a determining factor in deciding whether or not he acted intentionally.

You may also refer to all the other evidence which may indicate intent or not indicate intent. The Penal Law of the State of New York defines intentionally as follows: a person acts intentionally with respect to a result or conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct....

....

... What is intent, again I will define intent and intentionally to you, the Penal Law of the State of New York that a person acts intentionally with respect to a result or conduct described by a statute defining an offense when his conscious objective is to cause the result or engage in a conduct [sic].

....

... I have described intent and intentionally for you and defined them under our Penal Law, again, I repeat, a person acts intentionally with respect to a result or the conduct described by the law defining an offense when his conscious objective is to cause a result or engage in the conduct .... The law recognizes that intent is the subjective matter therefore, it allows you to base your finding of intention on any objective evidence, the defendant's action or any other evidence in the case which may indicate what his intention was.

Transcript at 760–61, 765, 767. Six and one-half hours after the jury began deliberations on the case, it sent a note to the judge stating that agreement had been reached on four of the five counts and requesting additional instructions on the meaning of the word "intent." Transcript at 808. The parties agree that the attempted murder count was the one count that remained to be resolved. In response to the request for further instructions, the judge made the following statement:

Now, Members of the Jury, a person acts intentionally with respect to attempting to cause death or injury to another person, when the alleged perpetrator's conscious objective is to cause such death or injury.

Intention is a subjective thing and depends on the operation of the individual's mind, nonetheless, it is possible to make a finding of intention based on the objective actions of the individual.

The Penal Law defines intentionally as follows: a person acts intentionally with respect to a result or conduct described by a statute to finding [sic] an offense when his conscious objective is to cause such result or to engage in such conduct.

By agreement, I can tell you that *people are presumed to intend the natural, probable and logical consequence of their acts.*

Transcript at 810 (emphasis supplied). The jury thereupon resumed deliberations. According to the minutes of the trial kept by the court clerk, the jury's verdict of guilty on all counts was received approximately twenty-five minutes later.

DISCUSSION

As noted, each petitioner in these two actions contends that his right to a fair trial was violated by an instruction given at his trial on the subject of intent. Specifically, Rivera contends that his conviction of first-degree manslaughter was rendered constitutionally infirm by the trial judge's statement that "[a] person is presumed to intend the natural and probable consequences of his act." Arroyo argues that his conviction of attempted murder was similarly tainted by the trial judge's statement that "people are presumed to intend the natural, probable and logical consequence of their acts."

The Court begins its analysis of the merits of the petitions filed in the *Rivera* action and the *Arroyo* action by observing that the State, in opposing these petitions, does not

argue that Rivera or Arroyo has either (1) failed to exhaust state remedies with respect to his constitutional claim, see 28 U.S.C. § 2254(b), or (2) forfeited his constitutional claim, see *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).[1] Rather, with respect to each petition, the State confines its opposition to arguing (1) that the instructions given by the state trial judge were not constitutionally impermissible and (2) that any constitutional error that did occur was harmless and hence cannot form the basis for this Court to grant a petition for a writ of habeas corpus. The Court deals with these two arguments in turn.

I

The basic constitutional question raised in both the *Rivera* action and the *Arroyo* action is whether a reasonable jury could have, on the basis of the trial judge's instructions on intent, employed a constitutionally impermissible "evidentiary device" to find beyond a reasonable doubt that the petitioner acted with the intent required to commit the crime of which he stands convicted. Analysis of this question requires the Court to begin by examining the constitutional limitations on the use in the criminal context of two distinct sorts of evidentiary devices, which devices the Court herein calls "mandatory presumptions" and "permissive inferences." Then, having explained the extent to which these two types of evidentiary devices are unconstitutional if employed in the criminal context, the Court considers whether the jury at either Rivera's or Arroyo's trial could reasonably have understood the judge's charge on intent as instructing the jury to employ a constitutionally impermissible mandatory presumption or permissive inference as a means of finding beyond a reasonable doubt the intent necessary to commit the crime in question.

A

The Court begins its discussion of mandatory presumptions and permissive inferences by defining those terms. Mandatory presumptions are evidentiary devices that *require* the trier of fact, upon finding one fact ("the underlying fact") to have been established, to find the existence of a second fact ("the presumed fact"). There are two types of mandatory presumptions. "Conclusive" mandatory presumptions leave the trier of fact with no alternative to finding the presumed fact upon finding the underlying fact. "Rebuttable" mandatory presumptions require the trier of fact to

1. Both Rivera and Arroyo clearly exhausted their state remedies by raising the constitutional claim in a motion pursuant to N.Y.Crim. Proc. Law § 440.10 and seeking all available appellate review of the denial of that motion. As regards *Wainwright v. Sykes*, it is well settled in this Circuit that the cause-and-prejudice test set forth in that case is only triggered if the state courts have previously invoked a procedural rule to bar the petitioner's constitutional claim. *Klein v. Harris*, 667 F.2d 274, 284 (2d Cir. 1981). Since the State did not argue any procedural ground when Rivera raised his instant constitutional claim on direct appeal, see Respondent's Brief at 21-23, and since the judge who ruled on Rivera's motion under N.Y.Crim.Proc. Law § 440.10 did not rely on any procedural ground, but reached the merits of Rivera's claim, there can be no argument that any state court has ever refused to hear Rivera's constitutional claim for procedural reasons. Thus, *Wainwright v. Sykes* is irrelevant to the *Rivera* action. The State, in its brief opposing Arroyo's petition, does make an oblique argument that *Wainwright v. Sykes* is somehow relevant to the *Arroyo* action. The Court observes, however, that the Appellate Division, in ruling on Arroyo's constitutional claim in the context of his direct appeal, found it "without merit," 57 A.D.2d at 523, 393 N.Y.S.2d at 570, and that the judge who presided at Arroyo's trial expressly held, in ruling on Arroyo's motion under N.Y.Crim.Proc. Law § 440.10 to vacate his conviction, that the failure of Arroyo's trial counsel to object to the instruction that Arroyo now challenges did not constitute a "procedural default" under New York law. At oral argument of Arroyo's petition, the State conceded to the Court that this ruling by the state court makes *Wainwright v. Sykes* irrelevant to the Court's adjudication of Arroyo's petition, notwithstanding the fact that subsequent New York state court decisions have found similar failures to make trial objections to be procedural defaults, because there can be no argument that any state court has ever invoked a procedural rule to preclude reaching the merits of Arroyo's constitutional claim.

find the presumed fact upon finding the underlying fact unless other evidence probative of the presumed fact negates the existence of the presumed fact. In contrast to mandatory presumptions, permissive inferences are evidentiary devices that *permit*, but do not require, the trier of fact to find the existence of a fact ("the inferred fact") upon finding that the underlying fact has been established.

[1-3] The constitutional limitations on the use of mandatory presumptions and permissive inferences in the criminal context derive from the rule, first enunciated in *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970), that a state criminal defendant may not, consistent with the due process clause of the fourteenth amendment, be convicted of a crime except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime. Under this principle, a defendant's constitutional rights are violated if state law creates an evidentiary device that, either by removing a question of fact from the jury's consideration, *see United States v. United States Gypsum Co.*, 438 U.S. 422, 446, 98 S.Ct. 2864, 2878, 57 L.Ed.2d 854 (1978), or by shifting to the defendant the burden of persuasion on a question of fact, *see Mullaney v. Wilbur*, 421 U.S. 684, 703–04, 95 S.Ct. 1881, 1892, 44 L.Ed.2d 508 (1975), relieves the prosecution of its burden of proving beyond a reasonable doubt a particular fact necessary to constitute the crime with which the defendant is charged. Since conclusive mandatory presumptions have precisely the issue-precluding effect condemned in *United States Gypsum*, and since rebuttable mandatory presumptions have precisely the burden-shifting effect condemned in *Mullaney*, mandatory presumptions, whether of the conclusive or rebuttable variety, are always unconstitutional when used in the criminal context to prove an element of the crime in question. *See Sandstrom v. Montana*, 442 U.S. 510, 520–24, 99 S.Ct. 2450, 2457–2459, 61 L.Ed.2d 39 (1979). However, since a permissive inference expressly leaves the trier of fact free to employ or to disregard the evidentiary device, permissive inferences are unconstitutional only where there is no rational way the trier of fact, absent the legal authorization to do so supplied by the permissive inference, could find the existence of the inferred fact upon having found the existence of the underlying fact. *County Court v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777 (1979).[2]

[4-6] The foregoing principles determine the constitutionality of state laws that either require or allow the trier of fact, upon finding that a criminal defendant performed an act, to find that the defendant intended for his act to have one of its natural and probable consequences. State laws are unconstitutional where they *require* the trier of fact, having found that the defendant performed an act, to find that the defendant intended for that act to have one of its natural and probable consequences. *Sandstrom v. Montana*, *supra*, 442 U.S. at 521–23, 99 S.Ct. at 2457–2459. A

2. Prior to the Supreme Court's decision in *County Court v. Allen*, there was considerable doubt concerning the proper standard for determining the constitutionality of a permissive inference when used in the criminal context. Some Supreme Court decisions indicated, as the Supreme Court ultimately held in *County Court v. Allen*, that a criminal permissive inference passes constitutional muster as long as a rational connection exists between the underlying fact and the inferred fact. *See, e.g., Tot v. United States*, 319 U.S. 463, 467–68, 63 S.Ct. 1241, 1244–1245, 87 L.Ed. 1519 (1943). Other decisions intimated that a permissive inference can withstand constitutional scrutiny when used in the criminal context only if demonstration of the underlying fact makes the existence of the inferred fact "more likely than not." *See, e.g., Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57 (1969). Still other decisions suggested that the correct test for the constitutionality of a criminal permissive inference is whether demonstration of the underlying fact makes existence of the inferred fact likely beyond a reasonable doubt. *See, e.g., Turner v. United States*, 396 U.S. 398, 405–18, 90 S.Ct. 642, 646–653, 24 L.Ed.2d 610 (1970). *See generally Barnes v. United States*, 412 U.S. 837, 841–46, 93 S.Ct. 2357, 2360–2363, 37 L.Ed.2d 380 (1973); Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv.L.Rev. 1187, 1199–1208 (1979).

state law creating such a mandatory presumption is not saved from constitutional infirmity if the trier of fact is relieved from the requirement of finding the presumed fact (that is, from finding that the defendant intended for his act to have one of its natural and probable consequences) in cases where the existence of the presumed fact is negated by other evidence probative of the presumed fact; this merely converts the mandatory presumption from the conclusive variety into the rebuttable variety. *Id.* at 324, 99 S.Ct. at 2459. On the other hand, state laws are not unconstitutional where they merely *permit* the trier of fact, having found that the defendant performed an act, to find that the defendant intended for that act to have one of its natural and probable consequences. *See Washington v. Harris*, 650 F.2d 447, 453 (2d Cir. 1981). Such a law, which merely creates a permissive inference, withstands constitutional scrutiny because there is a rational connection between the underlying fact (the defendant's act) and the inferred fact (the defendant's intent that the act would cause one of its natural and probable consequences). *County Court v. Allen*, *supra*, 442 U.S. at 157, 99 S.Ct. at 2224.

New York law does, and did at the time of both Rivera's and Arroyo's trials, authorize the trier of fact in a criminal trial to use a constitutionally proper permissive inference such as the Court has just described in order to find that the defendant acted with the requisite criminal intent. *People v. Getch*, 50 N.Y.2d 456, 465–66, 429 N.Y.S.2d 579, 583–84, 407 N.E.2d 425, 429 (1980). However, the trier of fact in a criminal trial is not, under New York law, and was not at the time of either Rivera's or Arroyo's trial, authorized to find the defendant's intent by using a constitutionally impermissible mandatory presumption such as the Court described above. *People v. Thomas*, 50 N.Y.2d 467, 472–73, 429 N.Y.S.2d 584, 587, 407 N.E.2d 430, 433 (1980). In sum, New York law is, and has been at all times relevant to the *Rivera* action and the *Arroyo* action, in accord with the constitutional limitations on the use of evidentiary devices such as mandatory presumptions and permissive inferences in order to find criminal intent.

Rivera and Arroyo do not challenge this view of New York law. Rather, their petitions argue that, notwithstanding the prevailing rule of New York law, the judges at their state trials each charged the jury on New York law in a manner at variance with the federal constitutional limitations on the use of a mandatory presumption as a means of finding criminal intent. The Court, having laid a foundation for doing so by explaining the constitutional limitations on the use of such mandatory presumptions, may now proceed to discuss whether the jury charge given at either Rivera's or Arroyo's trial exceeded these limitations.

B

[7] The standard that this Court must apply in evaluating the constitutional sufficiency of the jury charges given at Rivera's and Arroyo's state trials is whether, considering the charge as a whole, a reasonable jury could have interpreted the judge's charge in a fashion inconsistent with the Constitution. *Sandstrom v. Montana*, *supra*, 442 U.S. at 514, 99 S.Ct. at 2454. A charge susceptible of such an interpretation by a reasonable jury so infects the trial of which it is a part that a conviction rendered subsequent to the charge cannot withstand due process attack, *see Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973), even if the charge was also capable of being understood by a reasonable jury in a manner that comports with the Constitution, *see Leary v. United States*, *supra* note 2, 395 U.S. at 31–32, 89 S.Ct. at 1545–1546. Judgments of conviction must occasionally be vacated or reversed on this theory where the charge contained only one erroneous instruction. *See, e.g., Cool v. United States*, 409 U.S. 100, 102–03, 93 S.Ct. 354, 356–357, 34 L.Ed.2d 335 (1972). However, a judgment of conviction will not be rendered constitutionally infirm by one deficient instruction if the charge, when considered as a whole, clearly informs the jury of the correct legal principle. *Henderson v. Kibbe*, 431 U.S. 145, 153, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203

(1977); *see Cupp v. Naughten*, *supra*, 414 U.S. at 147, 94 S.Ct. at 400. That is, where there is "no possibility," given the judge's additional instructions, that a reasonable jury could have interpreted the charge as a whole to state a rule of law at odds with the Constitution, a single ailing instruction does not render the charge constitutionally deficient. *Nelson v. Scully*, 672 F.2d 266, 272 (2d Cir. 1982); *see United States v. Robinson*, 545 F.2d 301, 306 n.7 (2d Cir. 1976) (no error if trial judge's charge included additional instructions that "insur[ed]" jury understood correct rule).

[8, 9] The Court first applies these principles to the charge given by the judge at Rivera's trial. In discussing the crime of first-degree manslaughter, the judge at Rivera's trial correctly told the jury that it could only find Rivera guilty of that crime if it found beyond a reasonable doubt that Rivera intended to cause Guy Keyes serious physical injury. However, at the outset of his general charge on intent, the judge instructed the jury that "[a] person is presumed to intend the natural and probable consequences of his act." None of the judge's later instructions expressly qualified the first instruction's clear implication that, once the jury found that serious physical injury to Guy Keyes was a natural and probable consequence of an act performed by Rivera, the jury was then *required* to find that Rivera had the requisite intent to cause Guy Keyes serious physical injury. Thus, this instruction is perfectly consistent with, and reasonably could have been understood by the jury to describe, a constitutionally impermissible conclusive mandatory presumption. *Accord, Washington v. Harris*, *supra*, 650 F.2d at 453 (judge's instruction that "a person intends . . . the necessary and natural consequences of any act he performs" was "constitutionally defective"); *cf. United States ex rel. Eccleston v. Henderson*, 534 F.Supp. 813, 816–17 (E.D.N.Y.1981) (no error where trial judge, after instructing jury that "under our law a person is presumed to intend the natural and probable consequences of his acts," explained that "this presumption, like all presumptions, may be accepted or rejected by you"). Under the previously stated principles, the judge's charge was rendered constitutionally infirm by this mandatory presumption instruction unless the charge, when considered in its entirety, clearly informed the jury of the correct rule of law, that is, unless the charge clearly informed the jury, contrary to the particular instruction relied on by Rivera, that New York law *permitted*, but did not *require*, the jury to find the requisite intent to cause Guy Keyes serious physical injury if it first found that serious physical injury was a natural and probable consequence of an act performed by Rivera. *But see United States v. Winter*, 663 F.2d 1120, 1144 (1st Cir. 1981) (judge's charge is *always* constitutionally erroneous when it includes a mandatory presumption instruction like that given at Rivera's trial).

The Court begins its analysis of this question by making two observations. First, once a judge gives a single instruction on intent that the jury could reasonably understand to state a constitutionally invalid rule of law, the charge as a whole cannot possibly clearly inform the jury of the correct rule of law, no matter how many accurate instructions on intent the judge previously gave or subsequently gives, unless a reasonable jury would necessarily understand the other instructions to be at odds with the incorrect understanding that the jury reasonably could obtain from the ailing instruction. *See Callahan v. LeFevre*, 605 F.2d 70, 75 (2d Cir. 1979). That is, where the trial judge gives an instruction that is reasonably susceptible of a constitutionally invalid interpretation, and there is no necessary rhetorical inconsistency between such an interpretation of this instruction and the remainder of the judge's charge, it is plain that there is no ground for a court to hold that the charge as a whole clearly informed the jury of the correct rule of law. *Sandstrom v. Montana*, *supra*, 442 U.S. at 518–19 n.7, 99 S.Ct. at 2456–2457 n.7; *see, e.g., Getch v. Hammock*, No. CV–80–3363, slip op. at 20–22 (E.D.N.Y. Mar. 3, 1981) (finding that charge as a whole did not clearly inform jury of correct rule of law because

charge's permissive language was not necessarily rhetorically inconsistent with the constitutionally invalid interpretation jury reasonably could have given charge's mandatory language), *rev'd on other grounds mem.*, 672 F.2d 900 (2d Cir. 1981) (no constitutional error because judge's charge contained no mandatory language). Second, even if the court is able to identify such a necessary rhetorical inconsistency, it may only declare that the charge as a whole clearly informed the jury of the correct legal rule if the circumstances of the case are such that the jury must have resolved this inconsistency by rejecting the constitutionally invalid interpretation of the ailing instruction. *Sandstrom v. Montana*, *supra*, 442 U.S. at 525–26, 99 S.Ct. at 2459–2460; *see, e.g., Matarese v. LeFevre*, 514 F.Supp. 128, 132 (E.D.N.Y.1981) (holding, upon identifying necessary rhetorical inconsistency within charge, that "a reasonable juror could not interpret the [charge] as describing anything other than a permissive inference").

The State, in arguing that the charge as a whole clearly informed the jury at Rivera's trial of the correct rule of law, relies primarily on that part of the judge's general charge on intent where he instructed the jury that "[a] criminal intent may be inferred from all the circumstances of the case." The judge explained this instruction as follows: "You should consider what [the defendant] allegedly did, what means he allegedly employed, the type of instrument allegedly used, if any, the part of the body allegedly attacked, and all the circumstances. And from these surrounding circumstances you are to determine the intention of the defendant at the time." The State argues, and the Court agrees, that the jury reasonably could have understood this part of the judge's charge to entitle it to use a permissive inference in order to find that Rivera had the intent necessary to commit first-degree manslaughter. However, the Court does not find that this permissive inference instruction was necessarily rhetorically inconsistent with a constitutionally invalid interpretation of the judge's earlier conclusive mandatory presumption instruction. Given that the judge's permissive inference instruction did not contain the "natural and probable consequences" limitation contained in the mandatory presumption instruction, the jury could reasonably have put the two instructions together and concluded that it was (1) required to find the requisite intent if it found that serious physical injury to Guy Keyes was one of the natural and probable consequences of an act performed by Rivera, and (2) permitted to find the requisite intent, regardless of whether serious physical injury to Guy Keyes was one of the natural and probable consequences of an act performed by Rivera, by reference to all the facts and circumstances of the case. In other words, the jury reasonably could have understood the permissive inference instruction to offer it a route to finding the requisite intent that was merely *alternative* to, and hence was perfectly compatible with, the constitutionally deficient route made available by the conclusive mandatory presumption instruction. Thus, the permissive inference instruction did not necessarily prevent the jury from relying on a constitutionally infirm interpretation of the conclusive mandatory presumption instruction to find that Rivera acted with the requisite intent. *See Sandstrom v. Montana*, *supra* (finding constitutional violation notwithstanding fact that charge, in addition to telling jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," instructed jury (see Petitioner's Appendix at 36) that "[p]urpose and knowledge are manifested by the circumstances connected with the offense . . . [and] need not be proved by direct evidence, but may be inferred from acts, conduct, and circumstances appearing in evidence").

The State also argues that the judge eliminated any possibility that the jury would understand his charge to describe a constitutionally deficient mandatory presumption when, near the end of his general charge on intent, he instructed the jury that "[u]nder our law every person is presumed to intend the natural and inevitable consequences of his own voluntary acts and

unless such acts were done under circumstances which would preclude the existence of such intent, the jury has a right to infer from the result produced, the intention to effect such result." This argument fails for two reasons. *First*, the jury reasonably could have interpreted this instruction as two separate instructions, the first of which (*i.e.*, "[u]nder our law every person is presumed to intend the natural and inevitable consequences of his own voluntary acts") reiterated the earlier constitutionally infirm conclusive mandatory presumption instruction, and the second of which (*i.e.*, "and unless such acts were done under circumstances which would preclude the existence of such intent, the jury has a right to infer from the results produced, the intention to effect such result") reiterated the earlier constitutionally sound permissive inference instruction. Read in this fashion, this instruction, like the permissive inference instruction, is not rhetorically inconsistent with a constitutionally invalid interpretation of the conclusive mandatory presumption instruction. *Second*, the jury reasonably could have read this instruction as a single instruction, and concluded that it described a constitutionally impermissible rebuttable mandatory presumption. That is, the jury reasonably could have thought that, if it found that a natural and probable consequence of an act performed by Rivera was serious physical injury to Guy Keyes, this instruction *required* the jury to find that Rivera intended for this consequence to occur, unless other evidence probative of Rivera's intent negated such a finding.[3] If read as a single instruction, then, this instruction invited the jury to employ an unconstitutional means of finding the requisite intent, and therefore can hardly be said to have eliminated the possibility that the jury would behave in such a fashion.[4]

3. The Court recognizes that, if the jury did understand this instruction as a single instruction, it reasonably could have interpreted it to describe a permissive inference; further, since this instruction *does* contain a "natural and probable consequences" limitation, such an interpretation would have been rhetorically inconsistent with a constitutionally invalid interpretation of the earlier conclusive mandatory presumption instruction. The important point is that the jury did not *necessarily* follow this course. Rather, as described in text, the jury had two other reasonable courses available to it that each led to a constitutionally impermissible result: (1) the jury reasonably could have interpreted this instruction as two separate instructions, the first of which reiterated the judge's earlier constitutionally infirm conclusive mandatory presumption instruction and the second of which reiterated his earlier constitutionally sound permissive inference instruction; or (2) the jury reasonably could have interpreted this instruction as a single instruction, but understood it to describe a constitutionally impermissible rebuttable mandatory presumption. Also, the Court observes that the jury could reasonably have concluded (as, incidentally, the Court has after reading it repeatedly) that this instruction is not susceptible of *any* coherent interpretation. If the jury indeed reached such a conclusion, this instruction certainly did not eliminate the possibility that the jury relied on a constitutionally infirm interpretation of the judge's earlier conclusive mandatory presumption instruction to find that Rivera acted with the requisite intent.

4. The foregoing discussion demonstrates the fundamental differences between the charge given at Rivera's trial and the instruction that was at issue in *Washington v. Harris*, *supra*. As described in text, the *Rivera* action involves one instruction that reasonably could have been understood to describe a constitutionally impermissible conclusive mandatory presumption, and a second instruction that, because it began with mandatory language ("[u]nder our law every person is presumed") and ended with permissive language ("the jury has a right to find"), reasonably could have been interpreted as describing a constitutionally impermissible rebuttable mandatory presumption. In *Washington v. Harris*, the petitioner challenged the following statement by the judge to the jury: "On the question of intent, you may infer that a person intends that which is the natural and necessary and probable consequences of the acts performed by him and unless the act was done under circumstances to preclude the existence of such intent, you have a right to find from the results produced an intention to effect it." *See* 650 F.2d at 450. The Court of Appeals held that this instruction, because it began permissively ("you *may infer*") and ended permissively ("you have a right to *find*"), could only have reasonably been understood to state a permissive inference. *Id.* at 453. Thus, while the jury charge at issue in the *Rivera* action offered the jury two constitutionally impermissible routes to a guilty verdict, the judge at Washington's trial did not, in charging the jury on the crime of which Washington was convicted, give the jury a single instruction that rea-

State's argument that the charge at 's trial clearly informed the jury of correct legal rule also places heavy em- on the trial judge's statement that intent with which a crime has been mitted rests upon the prosecution to ish it by evidence beyond a reasonable ." While, by this instruction, the correctly (albeit confusingly) charged jury on the prosecution's burden of on the intent issue, this fact provides is for the Court to conclude that the could not reasonably have relied on a tutionally invalid interpretation of the conclusive mandatory presumption truction. As the Supreme Court stated *Sandstrom v. Montana*, *supra*, a beyond-reasonable-doubt instruction "is not rhetorically inconsistent with a conclusive or ...tion-shifting [mandatory] presumption [instruction]." 442 U.S. at 518–19 n.7, 99 S.Ct. at 2456–2457 n.7. Rather, the jury could reasonably have interpreted the two instructions to mean that the conclusive mandatory presumption was a mechanism through which the prosecution could satisfy its burden of proving beyond a reasonable doubt that Rivera intended Guy Keyes serious physical injury. *Accord, United States ex rel. Eccleston v. Henderson*, *supra*, 534 F.Supp. at 817.

The Court is accordingly unable to conclude that the jury at Rivera's trial would necessarily have understood any of the judge's later instructions to be rhetorically inconsistent with the incorrect understanding that the jury reasonably could have obtained from the judge's earlier conclusive mandatory presumption instruction.[3]

...nably could have been interpreted in a con- ...tutionally invalid fashion.

3. Even if one of the judge's later instructions had been necessarily rhetorically inconsistent ... the constitutionally invalid interpretation that the jury at Rivera's trial reasonably could have given the judge's conclusive mandatory presumption instruction, the Court would not thereby be able to state that the judge's charge as a whole clearly informed the jury of the correct rule of law, because it would be unable to conclude that the jury necessarily resolved such an inconsistency by rejecting the constitutionally invalid interpretation of the conclusive mandatory presumption instruction. The conclusive mandatory presumption instruction was the judge's first comment on intent and thus occupied a place of great prominence in the judge's charge on intent. Considered as a whole, the judge's charge used mandatory language and permissive language with about equal frequency. The jury did not send out any notes during its deliberations indicating that it was relying on one of the judge's other instructions to the exclusion of the conclusive mandatory presumption instruction. Thus, even if the Court were able to say that the jury necessarily must have either disregarded the constitutionally invalid interpretation of the conclusive mandatory presumption instruction or ignored one of the judge's later instructions, it would be wholly uncertain which of these courses the jury chose. *See Sandstrom v. Montana*, *supra*, 442 U.S. at 526, 99 S.Ct. at 2460.

The foregoing discussion demonstrates the difference between the *Rivera* action and the case currently faced by the Court of Appeals for this Circuit in *Nelson v. Scully*, *supra*. In that case, the Court assumed *for the purposes of argument* that *Wainwright v. Sykes*, *supra*, imposed no bar to Nelson's federal habeas corpus petition, 672 F.2d at 270, and further assumed that the judge at Nelson's trial had given an instruction that, like the mandatory presumption instructions given at Rivera's and Arroyo's trials, reasonably could have been interpreted in a constitutionally invalid manner, *id.* at 271–272. The court held upon reviewing the charge as a whole in the manner described and undertaken in text, that the judge's other instructions had made it "clear throughout" his charge that New York law permitted, but did not require, the jury to find the requisite intent to kill upon finding that the victim's death was a natural and probable consequence of one of Nelson's acts. *Id.* at 272 (quoting *People v. Green*, 50 N.Y.2d 891, 893, 430 N.Y.S.2d 267, 268, 408 N.E.2d 675, 675 (1980)). In its paragraph explaining this holding, the *Nelson v. Scully* court emphasized that the judge at Nelson's trial, like the judges at Rivera's and Arroyo's trials, correctly instructed the jury (1) that the jury could only find Nelson guilty of murder if it found that Nelson acted with the "intent" to kill the victim, (2) that an "intent" to kill means a "conscious objective" to cause death, and (3) that the prosecution was required to prove such an intent beyond a reasonable doubt. 672 F.2d at 272–273. However, as the Court has explained in text, and as the *Nelson v. Scully* court must have realized, instructions such as these are perfectly consistent with, and hence do not necessarily incline a reasonable jury to disregard, a mandatory presumption instruction. The Court accordingly does not believe that the outcome in *Nelson v. Scully* depended on the fact that the trial judge correctly instructed the jury on the elements of the crime in question, on the meaning of "intent," and on the prosecu-

Therefore, the Court is unable to find, upon reviewing the judge's charge as a whole, that the jury at Rivera's trial was clearly informed of the correct rule of law notwithstanding the constitutionally infirm conclusive mandatory presumption instruction. The judge at Rivera's trial thus committed error of constitutional dimension in charging the jury on intent. *Accord, Ramirez v. Jones*, 530 F.Supp. 345, 348–350 (S.D.N.Y. 1981) (holding virtually identical charge to have been constitutionally deficient). *But see Dudley v. Dalsheim*, 526 F.Supp. 88, 91 (S.D.N.Y.1981) (holding similar charge to have been constitutionally adequate). This error requires that Rivera's conviction of first-degree manslaughter be vacated unless the error may be found harmless.[6] Before dealing with the harmless error question, however, the Court discusses the constitutional sufficiency of the intent charge given at Arroyo's trial.

[10] The judge at Arroyo's trial, in similar fashion to the judge at Rivera's trial, told the jury that it could only find Arroyo guilty of attempted murder if it found beyond a reasonable doubt that Arroyo intended to cause the death of Raymond Bernard. However, in her final instruction to the jury on the general subject of intent, the judge told the jury that "people are presumed to intend the natural, probable and logical consequence of their acts." The jury could reasonably have understood this instruction to state that, if it found that the death of Raymond Bernard was a natural, probable and logical consequence of an act performed by Arroyo, the jury was then *required* to find that Arroyo had the requisite intent to cause the death of Raymond Bernard. This portion of the judge's charge is thus perfectly consistent with, and reasonably could have been understood by the jury to describe, a constitutionally impermissible conclusive mandatory presumption. Under the previously stated principles, the judge's charge was rendered constitutionally infirm by this mandatory presumption instruction unless the charge, when considered in its entirety, clearly informed the jury of the correct rule of law, that is, unless the charge as a whole clearly informed the jury, contrary to this particu-

tion's burden of persuasion. Rather, since the majority opinion in *Nelson v. Scully* is substantially informed by the view that the trial judge, instead of giving the standard "boiler-plate" charge on intent, repeatedly "hammered" at the jury with permissive language, 672 F.2d at 272, the Court believes that the *Nelson v. Scully* decision is better understood to depend on the court's view that the trial judge's charge on intent contained permissive language that was rhetorically inconsistent with the judge's mandatory language, and, more importantly, that the charge featured this permissive language significantly more prominently and frequently than the mandatory language. Since the judge at Rivera's trial gave what can only be described as a "boiler-plate" charge on intent, and since this charge did not use permissive language with greater frequency and prominence than it used mandatory language, *Nelson v. Scully* would not control the adjudication of Rivera's petition even if the judge at Rivera's trial had used permissive language in his intent charge that was necessarily rhetorically inconsistent with his mandatory language.

6. The State's other arguments in the *Rivera* action border on being frivolous. First, the State argues that *Sandstrom v. Montana*, *supra*, a decision heavily relied upon by Rivera, should not be given retroactive effect and thus cannot form the basis for vacating any conviction that occurred before its enunciation in 1979. However, since the decisions on which *Sandstrom v. Montana* rests were given retroactive effect, *see Hankerson v. North Carolina*, 432 U.S. 233, 240, 97 S.Ct. 2339, 2342, 53 L.Ed.2d 306 (1977) (giving retroactive effect to *Mullaney v. Wilbur*, *supra*); *Ivan V. v. City of New York*, 407 U.S. 203, 204, 92 S.Ct. 1951, 1952, 32 L.Ed.2d 659 (1972) (giving retroactive effect to *In re Winship*, *supra*), the Court is convinced that *Sandstrom v. Montana* must be given retroactive effect as well. *Accord, Dietz v. Solem*, 640 F.2d 126, 130–31 (8th Cir. 1981); *People v. Getch*, *supra*, 50 N.Y.2d at 464, 429 N.Y.S.2d at 562–62, 407 N.E.2d at 428. Second, the State argues that the Court should, in determining how the jury reasonably could have interpreted the judge's instruction that "[a] person is presumed to intend the natural and probable consequences of his act," be attentive to a purported difference between the legal and dictionary meanings of the word "presume." The Court finds it incredible that the State would make this argument, in light of the fact that the Supreme Court's decision in *Sandstrom v. Montana*, *supra*, was in large measure based on the *identity* between the legal and dictionary definitions of the word "presume." *See* 442 U.S. at 517, 99 S.Ct. at 2455.

lar instruction, that New York law *permitted*, but did not *require*, the jury to find the requisite intent to cause the death of Raymond Bernard if it first found that the death of Raymond Bernard was a natural and probable consequence of an act performed by Arroyo.

In arguing that the charge at Arroyo's trial, when considered as a whole, clearly informed the jury of the correct rule of law, the State relies on the undisputable facts that (1) the jury reasonably could have understood a different portion of the charge as entitling it to use a permissive inference to find the requisite intent, and (2) the judge clearly told the jury that the prosecution bore the burden of proving beyond a reasonable doubt that Arroyo intended to cause the death of Raymond Bernard. The Court's analysis of this argument is guided by the same two observations that predicated the Court's analysis of the similar argument made by the State in the context of the *Rivera* action. Once again, the State's argument fails because the constitutionally invalid interpretation that the jury reasonably could have given the mandatory presumption instruction was not necessarily rhetorically inconsistent with any of the other instructions that the judge gave on intent. First, the judge's mandatory presumption instruction was not, if interpreted in the constitutionally infirm manner that the Court has hypothesized, rhetorically inconsistent with her permissive inference instruction; to explain, whereas the mandatory presumption described by the judge could only be applied if the jury first found that the death of Raymond Bernard was a "natural, probable and logical" consequence of an act performed by Arroyo, the permissive inference described by the judge was available upon the jury's consideration of "all the [relevant] evidence which may indicate intent." Nor was the constitutionally invalid interpretation of the mandatory presumption instruction inconsistent with the judge's beyond-a-reasonable-doubt instruction, because the jury could reasonably have thought that the mandatory presumption instruction provided the prosecution with a mechanism for meeting the burden of proof set forth in the beyond-a-reasonable-doubt instruction.[7] Thus, neither the judge's permissive inference instruction nor her beyond-a-reasonable-doubt instruction provides a basis for the Court to conclude that the judge's charge, when considered as a whole, clearly informed the jury that New York law *permitted*, but did not *require*, the jury to find the requisite intent to cause the death of Raymond Bernard if it first found that the death of Raymond Bernard was a natural and probable consequence of an act performed by Arroyo.

The judge at Arroyo's trial thus committed error of constitutional dimension in charging the jury on the subject of intent.[8]

7. Even if either the judge's permissive inference instruction or her beyond-a-reasonable-doubt instruction had been necessarily rhetorically inconsistent with the constitutionally invalid interpretation that the jury at Arroyo's trial reasonably could have given the judge's mandatory presumption instruction, the Court would not thereby be able to state that the judge's charge as a whole clearly informed the jury of the correct rule of law, because it would be unable to conclude that the jury necessarily resolved such an inconsistency by rejecting the constitutionally invalid interpretation of the mandatory presumption instruction. The mandatory presumption instruction, being the last instruction that the judge gave to the jury, occupied the most prominent position in the judge's charge of any of her instructions on intent. Considered as a whole, the judge's charge did not use permissive language with significantly greater frequency than it used mandatory language. The Court notes that the jury deliberated for over six hours without being able to decide the intent question, then received the mandatory presumption instruction, and then convicted Arroyo on all counts twenty-five minutes later. This sequence hardly indicates that the jury excluded the mandatory presumption instruction from its deliberations. Thus, even if the Court were able to say that the jury necessarily must have either disregarded the constitutionally invalid interpretation of the mandatory presumption instruction or ignored one of the judge's earlier instructions, it would be wholly uncertain which of these courses the jury chose. *See Sandstrom v. Montana*, *supra*, 442 U.S. 526, 99 S.Ct. 2460, and the discussion of *Nelson v. Scully*, *supra*, in note 5, *supra*.

8. The State's other arguments in the *Arroyo* action border on being frivolous. First, the State argues that the instruction challenged by

Having therefore found that both Rivera's trial and Arroyo's trial were infected by constitutional errors, the Court turns to the question of whether either of these errors may be found to have been harmless.

II

[11, 12] The Supreme Court has imposed narrow limitations on the ability of a reviewing court to conclude that a federal constitutional error committed during a criminal trial was "harmless." Some constitutional rights are so basic to a fair trial that their infraction may never be treated as harmless error. *Holloway v. Arkansas*, 435 U.S. 475, 489, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978). Those federal constitutional violations that do not fall in the category of infractions that demand "automatic reversal" may be deemed nonprejudicial in a given case, but only if the reviewing court is able to declare a belief that the violation in question was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); *Forman v. Smith*, 633 F.2d 634, 642 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1710, 68 L.Ed.2d 204 (1981).

The Supreme Court has not yet decided whether an error such as occurred at the trials of Rivera and Arroyo may ever be declared harmless. *McKenzie v. Montana*, 449 U.S. 1050, 1052 n.2, 101 S.Ct. 626, 628 n.2, 66 L.Ed.2d 507 (1980) (Marshall, J., dissenting from denial of certiorari); *see Sandstrom v. Montana*, *supra*, 442 U.S. at 526–27, 99 S.Ct. at 2460–2461 (expressly leaving question open). However, in *Washington v. Harris*, *supra*, the Court of Appeals for this Circuit reversed a district court decision granting a habeas corpus petition based on the same theory as the petitions filed by Rivera and Arroyo; the Court remanded the action for consideration of whether the erroneous instruction was harmless. 650 F.2d at 453–54. In this Circuit, then, constitutional violations such as the Court is presently considering may, in an appropriate case, be declared harmless. *Accord, Nelson v. Scully*, *supra*, 672 F.2d at 279 (Oakes, J., dissenting). *See also United States v. Williams*, 665 F.2d 107, 110 (6th Cir. 1981); *United States v. Winter*, *supra*, 663 F.2d at 1144–45; *McGuinn v. Crist*, 657 F.2d 1107, 1108–09 (9th Cir. 1981); *Jacks v.*

Arroyo, to wit, "people are presumed to intend the natural, probable and logical consequence of their acts," materially differs from the instruction held invalid by the Supreme Court in *Sandstrom v. Montana*, *supra*, which instruction stated that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *See* 442 U.S. at 513, 99 S.Ct. at 2453. Specifically, the state contends that the instruction at issue in the *Arroyo* action, unlike the instruction considered in *Sandstrom v. Montana*, was not characterized by the trial judge as a principle of law. Apparently, the State's argument is that, since the judge at Arroyo's trial prefaced her challenged instruction with the phrase "[b]y agreement I can tell you that," the jury must have interpreted this instruction as something akin to a new stipulated fact rather than a rule of law. Accepting for present purposes the dubious proposition that the instruction would pass constitutional muster if the jury did understand it in this fashion, the Court is unable to conclude that this was indeed the jury's understanding. In the Court's view, it is at least equally likely that the jury understood the judge's prefatory comment to mean that the parties had agreed upon a correct statement of a principle of law.

Second, the State contends that where, as here, the defendant's act has merely caused a person to be wounded, a mandatory presumption instruction such as the judge gave at Arroyo's trial only requires the jury, if it finds that the wounding was a natural and probable consequence of the act, to find that the defendant intended to wound the victim. Thus, the State takes the position that the jury at Arroyo's trial, while it could have used the instruction to find that Arroyo intended to cause Raymond Bernard serious injury, could not have used the instruction to find that Arroyo intended to cause Raymond Bernard's *death*. The obvious flaw in this argument is that the jury did not necessarily interpret the instruction in question in the fashion suggested by the State. In the Court's view, the jury could reasonably have understood this instruction to state that, if the jury found that the death of Raymond Bernard, though it did not actually occur, was one of the natural and probable consequences of an act performed by Arroyo, the jury was required to find in turn that Arroyo intended to cause the death of Raymond Bernard. Plainly, if the jury adopted this interpretation rather than the one advanced by the State, the jury may indeed have used the challenged instruction to find that Arroyo intended to cause Raymond Bernard's death.

Duckworth, 651 F.2d 480, 485–87 (5th Cir. 1981); *Dietz v. Solem*, *supra* note 6, 640 F.2d at 131 (all holding that constitutionally infirm mandatory presumption instructions similar to those at issue here may be found harmless).

[13] In order to conclude that either Rivera or Arroyo was not prejudiced by the federal constitutional violation that occurred at his trial, the Court must, as noted, be able to declare a belief that this violation was harmless beyond a reasonable doubt. *Chapman v. California*, *supra*, 386 U.S. at 24, 87 S.Ct. at 828. There is some confusion as to the proper application of *Chapman's* reasonable-doubt standard where, as here, the putatively harmless constitutional error was created by a jury charge that reasonably could have been interpreted to describe a constitutionally invalid mandatory presumption. One line of cases supports a rule that a reviewing court should determine whether such an error was harmless by asking if, given the evidence in its entirety, the jury would beyond a reasonable doubt have found the presumed fact if the mandatory presumption instruction had not been given. *See, e.g., Jacks v. Duckworth*, *supra*, 651 F.2d at 487 (error identical to those at issue here found harmless because evidence was "overwhelming" that defendant acted with the requisite intent). A second line of cases states that a reviewing court faced with such an error should inquire whether it is certain beyond a reasonable doubt that the jury did not find the presumed fact by applying the mandatory presumption that it reasonably could have understood the judge's charge to describe. *See, e.g., United States v. Williams*, *supra*, 665 F.2d at 110. The decision of the Supreme Court in *County Court v. Allen*, *supra*, provides the complete answer to this question. There the Court stated that "it [is] irrelevant in analyzing a mandatory presumption, but not in analyzing a purely permissive [inference], that there is ample evidence in the record other than the presumption to support a conviction." 442 U.S. at 160, 99 S.Ct. at 2226. This Court therefore holds, in accordance with the second of the above-cited lines of cases, that harmless error analysis of a constitutionally invalid mandatory presumption instruction should proceed from an inquiry whether the record permits the reviewing court to conclude beyond a reasonable doubt that the jury did not apply the presumption in arriving at its verdict. *See McKenzie v. Montana*, *supra*, 449 U.S. at 1055, 101 S.Ct. at 629 (Marshall, J., dissenting from denial of certiorari) ("court must ask whether the defective instruction may have contributed to the jury verdict" in assessing whether erroneous mandatory presumption instructions such as were given here were harmless).

[14] Thus, the question to be answered in both the *Rivera* action and the *Arroyo* action is whether the Court is certain beyond a reasonable doubt that the jury did not find the intent element of the crimes in question by concluding that it was required, having found that the defendant performed an act having certain natural and probable consequences, to proceed to find that the defendant intended those consequences. The Court is frank to say that, in light of the general verdicts that are usually rendered in criminal trials, it would expect to have the requisite degree of certainty that a mandatory presumption instruction was harmless only in an exceptional case. *See* Note, *Harmful Use of Harmless Error in Criminal Cases*, 64 Cornell L.Rev. 538, 553–55 (1979).[9] For the reasons that follow, the

9. There are, to be sure, some cases where a reviewing court could indeed be certain beyond a reasonable doubt that an error such as occurred at Rivera's and Arroyo's trials did not affect the jury's verdict in the fashion described above. For example, a reviewing court would have the requisite certainty where the defendant admitted that he intentionally murdered the victim but claimed that he did so in self-defense. *Washington v. Harris*, *supra*, 650 F.2d at 453–54; *see, e.g., United States ex rel. Tsirizotkis v. LeFevre*, 534 F.Supp. 40, 42 (E.D.N.Y.1981), *aff'd mem.*, No. 81-2107 (2d Cir. Sept. 22, 1981). Also, a reviewing court should find a mandatory presumption instruction harmless with respect to any count that does not include among its elements the intent that the mandatory presumption instruction invited the jury to find. *See, e.g., Holloway v. McElroy*, 632

Court concludes that neither the *Rivera* action nor the *Arroyo* action is a case of this variety.

[15] The State's position on the harmless error question is based on its assertion that the intent issue, while not expressly conceded by Rivera and Arroyo at their trials, was not seriously contested by them either. Apparently, the State believes that an error such as occurred at Rivera's and Arroyo's trials must always be declared harmless unless the defendant, either by direct testimony or the argument of counsel, has affirmatively advanced the intent issue. This argument, if accepted, would completely undermine that rationale for holding that mandatory presumption instructions are constitutionally infirm. It would be the height of absurdity for a reviewing court (1) to hold that a trial judge's charge was constitutionally invalid because it contained a rebuttable mandatory presumption instruction that shifted the prosecution's burden of persuasion on the intent issue to the defendant, but then (2) to call the error harmless because the defendant did not vigorously contest the intent issue. The whole premise for the constitutional attack on such mandatory presumption instructions is that they shift the burden of persuasion to the defendant on an issue with respect to which the defendant is perfectly entitled to prevail even if he does nothing.[10] In the Court's view, then, where the defendant has not expressly conceded that he acted with the requisite intent, harmless-error analysis of mandatory presumption instructions such as the judges gave at Rivera's and Arroyo's trials should not depend on how vigorously the defendant contested the intent issue. Instead, the proper inquiry is whether the reviewing court is certain beyond a reasonable doubt that the jury did not employ the mandatory presumption instruction in making its finding that the defendant had the requisite intent. *Accord, Burton v. Bergman*, 649 F.2d 428, 432 (6th Cir. 1981); *Dietz v. Solem, supra* note 6, 640 F.2d at 131. *But see United States v. Winter, supra*, 663 F.2d at 1144 (unconstitutional mandatory presumption instruction harmless because "appellants are not claiming that they did not intend the natural and probable or ordinary consequences of their acts"); *McGuinn v. Crist, supra*, 657 F.2d at 1108–09 (unconstitutional mandatory presumption instruction harmless "in the absence of any positive contention" by the defendant that he lacked requisite intent); *United States ex rel. Eccleston v. Henderson, supra*, slip op. at 9–10 (unconstitutional mandatory presumption instruction harmless because at trial "there was . . . no real question about intent").

[16] Upon engaging in this inquiry in the context of the *Rivera* action, the Court is unable to declare the error committed at Rivera's trial to have been harmless because it is unable to find beyond a reasonable doubt that the mandatory presumption instruction was not employed by the jury in reaching its guilty verdict on the first-degree manslaughter count. In order to find Rivera guilty of first-degree manslaughter, the jury was required to find (1) that Riv-

F.2d 605, 635 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028, 101 S.Ct. 3019, 69 L.Ed.2d 398 (1981); *United States v. Continental Group, Inc.*, 603 F.2d 444, 464 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980). In these two types of cases, either intent was never a legal issue with respect to the crime charged or the defendant himself made a concession that removed intent as an issue, leaving the reviewing court certain beyond a reasonable doubt that the jury's verdict was not arrived at by use of the mandatory presumption instruction.

10. A similarly illogical result would be for a reviewing court to find a conclusive mandatory presumption instruction constitutionally infirm because it entirely removed the element of intent as a factual issue, but then to call the error harmless because of the defendant's failure to ask the jury not to find that fact. Aside from the illogic that would inhere in a decision condemning the defendant's failure to litigate a factual question that the judge ultimately removed from the jury's consideration, such a holding would neglect the principle that the defendant is not required to do anything at all to be entitled to a jury determination of each element of the crime charged, and would ignore the fact that the defendant occasionally prevails at trial on an issue as to which he has neither offered testimony nor made argument.

caused the death of Guy Keyes, and (2) that Rivera, in so doing, intended to cause Guy Keyes serious physical injury. At his trial, Rivera vigorously contested the first of these elements by testifying that he never stabbed Guy Keyes. However, adoption of this defense did not require Rivera to concede that he had intended to cause Guy Keyes serious physical injury. Indeed, Rivera, by denying that he had pursued Guy Keyes with the intent of stabbing him, contested this element as well. At the conclusion of the trial, then, the issue of whether Rivera intended to cause Guy Keyes serious physical injury was submitted to the jury for its determination. The jury, since it found Rivera guilty of first-degree manslaughter, plainly found that Rivera did have this intention. Given the fact that the judge gave the mandatory presumption instruction as the first sentence of his general charge on intent, and then reiterated this instruction at the end of his general charge on intent, there is simply no way the Court can say that it is certain beyond a reasonable doubt that the jury did not employ the mandatory presumption instruction to arrive at its finding that Rivera intended to cause Guy Keyes serious physical injury. The Court is thus unable to find beyond a reasonable doubt that the error committed at Rivera's trial did not affect the jury's verdict, and accordingly may not declare that error to have been harmless.

[17] Turning to the *Arroyo* action, the Court reaches a similar conclusion. In order to find Arroyo guilty of attempted murder, the jury was required to find (1) that Arroyo fired a loaded gun at Raymond Bernard, thereby causing Raymond Bernard to be wounded, and (2) that Arroyo, in so doing, intended to cause the death of Raymond Bernard. At his trial, Arroyo placed both of these elements in issue. Sue Lydia Pratts' testimony that Arroyo never fired a gun at all created an issue with respect to the first element. Arroyo's own testimony that he had no recollection of firing a gun created an issue whether Arroyo had, in the short period of time involved, formed the intent to kill constituting the second element. Thus, Arroyo did not ever concede that he had intended to cause the death of Raymond Bernard. At the conclusion of the judge's charge, then, this issue was submitted to the jury for its determination. The jury, since it found Arroyo guilty of attempted murder, plainly found that Arroyo did intend to cause the death of Raymond Bernard. Given that the judge gave the mandatory presumption instruction in response to a specific jury request, after six and one-half hours of deliberation, for additional instructions on intent, and that the jury's verdict was rendered only twenty-five minutes after the judge gave the mandatory presumption instruction, there is simply no way the Court can say that it is certain beyond a reasonable doubt that the jury did not employ the mandatory presumption instruction to arrive at its finding that Arroyo intended to cause the death of Raymond Bernard. The Court is thus unable to find beyond a reasonable doubt that the error committed at Arroyo's trial did not affect the jury's verdict on the attempted murder count, and accordingly may not declare the error to have been harmless with respect to that count.

CONCLUSION

Rivera and Arroyo have shown that the judges at their state trials each committed error of constitutional dimension in instructing the jury on the subject of intent. The Court is unable to find either error to have been harmless. Therefore, the Court concludes that the petitions filed by Arroyo and Rivera must be granted.

The Court is frank to say that it has not reached this decision easily. A federal district judge does not lightly declare that two justices of the Supreme Court of the State of New York have committed trial errors of constitutional dimension and that the New York appellate courts have missed several opportunities to correct these errors. Moreover, while no decision by the Court of Appeals for this Circuit controls this Court's adjudication of Rivera's and Arroyo's petitions, the Court is well aware that the Court of Appeals has never affirmed a dis-

trict court decision that granted a habeas corpus petition in reliance on *Sandstrom v. Montana*.

However, while these considerations weigh heavily on the Court's mind, the Court is bound to follow the decisions of the United States Supreme Court. *Sandstrom v. Montana* teaches that, if the jury charge at a defendant's trial included a mandatory presumption instruction on the subject of intent, a reviewing court must vacate the defendant's conviction unless it is able to state a belief either (1) that the jury, upon hearing the judge's charge as a whole, could not reasonably have interpreted the charge to state a constitutionally impermissible rule of law, or (2) that any constitutional error that did occur was harmless beyond a reasonable doubt. After a careful consideration of the facts relevant to the *Rivera* action and the *Arroyo* action, the Court has concluded that it cannot honestly and in good conscience state such a belief with respect to either action.

Accordingly, the petitions filed in 80 Civ. 7447(RJW) and 81 Civ. 1280(RJW) are both granted. Rivera is entitled to a new trial on the first-degree manslaughter count of which he was convicted; he shall be released from custody if he is not retried within sixty (60) days of the date of this decision. Arroyo is entitled to a new trial on the attempted murder count of which he was convicted; he shall be released from custody if not retried within sixty (60) days of the date of this decision.

It is so ordered.

MODERN WOODCRAFTS, INC., Kidde Merchandising Equipment Group, Inc., Hartford Builders Finish Company, Inc., Harry R. Nilson, Kenneth R. Conley, John R. Bartz, Charles Siemer, Peter Milliard, Donald C. Ramsay, Donald M. Jacobson, James D. Ricketson, William P. Fappiano, Kip Lockhart

v.

Paul H. HAWLEY, Howard G. Weiss, Francis DeLuca, V. Gibney Patterson, Robert J. McLevy, John Cunningham, Joseph Barile and David Saldibar as Trustees of the Connecticut State Council of Carpenters State-Wide Pension Plan and Trust.

Civ. A. No. H 80-316.

United States District Court,
D. Connecticut.

Feb. 16, 1982.

Contributing employers and union and management trustees of multiemployer pension benefit plan brought suit against the plan raising issues under trustees of the Labor Management Relations Act and the Employee Retirement Income Security Act as well as pendent state law claims. Upon defendants' motion to dismiss, the District Court, José A. Cabranes, J., held that: (1) employers and union management trustees of multiemployer pension benefit plan, which each alleged that they had suffered actual injury as result of the "arbitrary and capricious" character of rules of the benefit plan, had standing to sue trustees of benefit plan for violation of section of Labor Management Relations Act exempting from restrictions on financial transactions an employer contribution to an employee benefit trust fund which is administered for sole and exclusive benefit of the employees and their families and dependents; (2) section of Labor Management Relations Act exempting from restrictions on financial transactions an employer contribution to an employee benefit trust fund which is administered for sole and exclusive benefit of the employees and

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No. 82-5763

IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

EDWIN RIVERA,

Petitioner,

-against-

PHILIP COOMBE, JR., Superintendent,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

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Question Presented

Whether the "charge as a whole" analysis of the Court of Appeals for the Second Circuit, as applied to claimed violations of the principle enunciated in Sandstrom v. Montana, 442 U.S. 510 (1979), so conflicts with decisions of other United States Courts of Appeals as to warrant resolution by this Court.

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IN THE

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EDWIN RIVERA,

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-against-

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

Preliminary Statement

This memorandum is submitted on behalf of respondent, who does not oppose petitioner's petition for a writ of certiorari, but instead requests this Court to consider the petition in conjunction with other petitions now pending in this Court and raising similar issues.

For purposes of this memorandum, respondent adopts the "Statement of the Case" set forth at pages 1-9 of the petition for a writ of certiorari.

MEMORANDUM

On October 1, 1982, the Attorney General of the State of New York filed in this Court a petition for a writ of certiorari, Ramirez v. Jones (No. 82-504), arguing that coherence of federal jurisprudence necessitates this Court's now resolving the conflict which has developed among the United States Courts of Appeals in their interpretations and applications of Sandstrom v. Montana, 412 U.S. 510 (1979). Through counsel (the New York Legal Aid Society), respondent Ramirez argued in opposition that "Sandstrom's progeny in the circuit courts of appeal show substantial harmony," and that "the circuits have been largely consistent" in interpreting that decision (Brief for Respondent in Opposition, at 3 and 10).

In the instant case, however, petitioner's counsel (again, the New York Legal Aid Society) now asserts (Petition for a Writ of Certiorari, at 17) the following:

> ...the Second Circuit's sweeping "charge as a whole" analysis conflicts both with the Eighth Circuit's analysis and with that in Sandstrom itself. To resolve the conflict, petitioner's case should be accorded this Court's full plenary review.

In view of the fact that the Attorney General of the State of New York and the New York Legal Aid Society, as counsel for the parties in both Ramirez v. Jones (No. 82-584) and in the instant case, explicitly recognize that there is some conflict between at least two circuits regarding the proper analytical framework in which to scrutinize a claimed Sandstrom error, and further in view of the several petitions now pending before this Court in which the application of Sandstrom is one of the primary

questions presented,* respondent herein respectfully requests that the instant petition be considered in conjunction with the petition for a writ of certiorari previously filed by the Attorney General of the State of new York in Ramirez v. Jones, supra, or that consideration of the instant petition be held in abeyance until this Court's disposition of the Ramirez petition, or that all pending petitions posing questions concerning the application of Sandstrom be consolidated and certiorari granted as to them.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE CONSIDERED IN TANDEM WITH THAT STILL PENDING IN RAMIREZ V. JONES (No. 82-584) AND/OR ANY OTHER PETITIONS RAISING SANDSTROM ISSUES, OR SHOULD BE CONSOLIDATED WITH THOSE PETITIONS WITH A VIEW TOWARD GRANTING CERTIORARI TO RESOLVE EXISTING CONFLICTS AMONG THE CIRCUITS CONCERNING THE PROPER INTERPRETATION AND APPLICATION OF THIS COURT'S DECISION IN SANDSTROM V. MONTANA, 412 U.S. 510 (1979).

Dated: New York, New York
December , 1982

Respectfully submitted,

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* See Arroyo v. Jones, 685 F. 2d 35 (2d Cir. 1982), petition for cert. filed, September 21, 1982 (No. 82-521); Langone v. Smith, 682 F. 2d 287 (2d Cir. 1982), petition for cert. filed, September 15, 1982 (No. 82-5395); Mancuso v. Harris, 677 F. 2d 206 (2d Cir. 1982), petition for cert. filed, August 16, 1982 (No. 82-5239).